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Supreme Court, U.S.
FILED

No. 02 1073 JAN 8 2003

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IN THE
SUPREME COURT OF THE UNITED STATES

WILHELMINA G. KING,
Petitioner

v.

SCHOOL BOARD OF BROWARD COUNTY AND
FRANK PETRUZIELO
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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BRIEF INTRODUCTION

Petitioner, Wilhelmina G. King respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 7, 2002 affirming the decision and orders of the Court for the Southern District of Florida.

Wilhelmina G. King petitions this Court for Writ of Certiorari on issues of whether the Court of Appeals erred in its interpretation and application of Florida statutes regarding contracts for school administrators; whether the district court improperly issued a Summary Judgment in favor of respondents, whether the district court abused its discretion in failing to issue a default judgment against respondents for failure to respond to a Motion for Default judgment and for repeated discovery abuses after lesser sanctions had been attempted and were unsuccessful in compelling complete and timely responses; and whether the district court was compelled to present the case to the jury as respondent's actions in repeated discovery abuses rose to the level of a spoliation of evidence.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT ASSIGNMENT LETTERS INDICATING THE PLACE AND SALARY OF A FLORIDA SCHOOL ADMINISTRATOR WERE CONTRACTS, EVEN THOUGH THE LETTERS DID NOT CONTAIN THE ELEMENTS OF AN ADMINISTRATOR CONTRACT AS PRESCRIBED BY FLORIDA LAW.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ISSUE A "DEATH PENALTY" SANCTION TO RESPONDENTS WHO FAILED TO RESPOND TO THE MOTION FOR DEFAULT JUDGMENT AND REPEATEDLY FAILED TO COMPLY WITH DISCOVERY REQUESTS EVEN AFTER LESSER SANCTIONS WERE IMPOSED.

III. WHETHER A DISTRICT COURT ABUSES ITS DISCRETION WHEN IT FAILS TO PROPERLY APPLY EVIDENTIARY STANDARDS ON SUMMARY JUDGMENT.

IV. WHETHER A DISTRICT COURT ABUSES ITS DISCRETION WHEN IT FAILS TO PERMIT A CASE TO PROCEED TO THE JURY WHEN A SPOLIATION ISSUE EXISTS.

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OPINIONS BELOW

The decision of the Court of Appeals *in King v. School Board of Broward County,* 01-15861 (Appendix ("A")[1], A:1) is unreported. The rulings of the district court in *King v. The School Board of Broward County,* 99-06059-SH (A:3, A:4; A:5;) are unreported.

JURISDICTION

Petitioner seeks review of the Court of Appeals' Order and Judgment of June 7, 2002. [A:1] Petitioner's timely petition for rehearing was denied on October 10, 2002 (A:2) requiring the application to be filed on or before January 8, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Petitioner's original action was removed from the Florida State Court predicated upon federal question jurisdiction pursuant to *inter alia,* 28 U.S.C. §1343 and 42 U.S.C. §2000e et seq.

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[1] Items referenced in the Appendix are designated as "A." Items which are located in the Record below are designated herein as "R" followed by a number indicating the volume. The page number is indicated next and followed (when necessary) by line numbers.

CONSTITUTIONAL RULES, STATUTES AND PROVISIONS INVOLVED

U.S. Constitution 14th Amendment
Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. CHAPTER 21 SUBCHAPTER I **§1983**
Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

42 U.S.C. A. TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 21--CIVIL RIGHTS SUBCHAPTER VI-EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-2. Unlawful employment practices
(a) Employer practices It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Federal Rule of Civil Procedure 37
(a) Motion for Order Compelling Disclosure or Discovery.
A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:
(A) If a party fails to make a disclosure required by Rule 26(a) , any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.
(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31

, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a) , or a party fails to answer an interrogatory submitted under Rule 33 , or if a party, in response to a request for inspection submitted under Rule 34 , fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response.

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken.

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35 , or if a party fails to obey an order entered under Rule 26(f) , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; ... In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after

affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure. (2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36 , and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a) , or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

Federal Rule of Civil Procedure 56

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time. move with or without supporting affidavit for summary judgment in the party's favor as to all or any part thereof.

Federal Rule of Civil Procedure
Local Rule 7.1.C
Memoranda of Law.

Each party opposing a Motion shall serve an opposing memorandum of law no later than 10 days after service of the motion as computed by the Federal Rules of Civil Procedure. Failure to do so may be deemed sufficient cause for granting the motion by default."

Florida State Law §231.36(1)(a)

regarding Contracts with Instructional staff, supervisors and principals states:

Each person employed as a member of the instructional staff in any district school system shall be properly certificated pursuant to s. 231.17 or s. 231.1726 or employed pursuant to s. 231.1725 and shall be entitled to and shall receive a written contract as specified in chapter 230. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. ..."

STATEMENT OF THE CASE

I. *Petitioner's Facts Statement*

Wilhelmina G. King Ed.D, a black female, is employed by Broward County Schools. As a teacher, Dr. King received her continuing contract in 1973. R4-145;25. Dr. King became an administrator in 1984 (an assistant principal) but still maintained a designation of teacher on continuing contract. R4-145;126-128 She has not signed any contract since becoming an administrator and has each year since signing her continuing contract received a letter/memo indicating where she would be employed for the following year and the level of pay she will receive. R4-127;20[21][1];109-114. The letters come from the Broward County School District, and do not purport to be contracts, nor do the letters state that they are an agreement nor do they state that they are a modification of any existing agreement. Dr. King did not negotiate any items in the letters nor did she sign the letters, nor was she asked to evidence any agreement with the content of the letters.

In 1988 Dr. King was appointed to principalship at Markham Elementary School (hereinafter "Markham"), first as an Interim Principal, and thereafter as Principal through the Spring of 1994. R4-127;22[29-31].

Markham Elementary was a low-performing school with a student body comprised primarily of low-income minority families. R4-127;22[35], R4-132;24,R4-132;123. Located in an economically depressed area, it was difficult to attract and maintain staffing. R4-127;22[35], R4-132;92. During her term at Markham, Dr. King sought to improve academic performance and morale at the school. R4-127;18[15-

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[1] **The [ ] denotes a reference to pages in a deposition where the Deposition Transcript has been submitted in the "Four to a page" format.**

16], 21;[27-28], 23; [35-36], 25;41-44]. However, many semesters during her tenure at Markham, Dr. King worked without a full-time assistant principal and each year with a different assistant principal. R4-127;33[76].

School based administrators, during the relevant period, were evaluated on a three tier rating system. R4-127;47[131], R4-132;74-75. The ratings were, "performing at a professional level" "needs improvement in performance" and "unsatisfactory." R4-127;47[131], R4-132;74-75. Generally, as a result of the situation at the school (increased lower income families, lower performing students and language barriers, more government programs to monitor and more financial issues [free lunch, etc.] to be managed by the administrator) R4-127;26[47], and errors made by staff, (See Performance Evaluations at R4-127;115-168) Dr. King received "needs improvement" ratings in some of the subcategories of the different areas evaluated. However, she received an overall "needs improvement" rating on only one (1) of her mid-year evaluations during her six year tenure at Markham and only one (1) "needs improvement" on a final evaluation. R4-127;152, R4-127;22-34, 47; [130-131], R4-132;74-81. Each year from 1988 through 1993 Dr. King received a final evaluation rating of "performing at a professional level." R4-127;22-34, R4-132;74-81, R4-127;115-168.

In 1992, Dr. King, as is permitted by Broward County School policy, met with her Area Director and requested a non-schoolbased administrative assignment. R4-127;56[166-167], 37[91], as the years at the school had taken their toll and she was beginning to feel "burned out." R4-127; 37[92]. This request was granted. R4-142;40. As stated in a memorandum by her supervisor, this transfer was neither a disciplinary action nor a demotion. R4-142;40. Dr. King was not placed on a Performance Development Plan (PDP) as would be required before a demotion nor was she required to take any steps to cure any perceived deficiency. The following year Markham was staffed with two principals.(R4-127;25[44], R4-132;29) to manage the responsibilities that Dr. King was required to do alone.

In early 1994, a new Superintendent of Schools was hired, Dr. Frank Petruzielo. (R4-135;2-6) One of the policies adhered to by Dr. Petruzielo was that if a person was not being recommended for reappointment to his/her position the following year, that person was to receive his/her end of the year evaluation prior to the end of March so that the individual would have the opportunity to contest the non-appointment before the School Board. (R4-135;5[17])

It is uncontested that Dr. King's final evaluation was not given prior to the end of March of 1994. It is further uncontested that in Dr. King's June 1994 final evaluation she received a rating of "needs improvement" although at the mid-year, Dr. King received a "performing at a professional level" rating. Dr. King contested the "needs improvement" rating as undeserved. R4-127;37[90].

The same year, a white female, Paulette McClane, a Middle School Principal received an overall rating of "needs improvement" but was appointed to an Elementary School Principalship the following year. R4-145;16. The existence of Ms. McClane was produced in the Initial Disclosures by the School Board's previous attorney, Carlton Bober who withdrew in August 1999 and was replaced by the Firm Haliczer, Pettis & White (R1-Doc.29) Dr. King submitted her first Requests for Production and Interrogatories to Haliczer, Pettis & White as counsel for Broward County in September 1999. After the deadline for response, Dr. King requested the information from Broward County. After another month, Broward County failed to respond. On November 11, 1999, Dr. King filed her Motion for Default Judgment R2-Doc. 47. At all times during the discovery process, including the original service of discovery and the filing of the first Motion to Compel, Haliczer, Pettis & White was counsel for Broward County. R1-Docs. 29, 32. The hearing on Dr. King's First Motion to Compel was heard on or about March 1, 2000, wherein the Court ordered the payment of Dr. King's attorneys fees and costs in bringing the Motion and ordered that Broward County reply to the First Requests for Production R2-Doc.57.

In the Court's follow-up hearing on March 29, 2000 the Court ordered Broward County to respond to the discovery on or before April 10, 2000 and further ordered them to pay Dr. King's counsel's expenses in travelling to Florida for the March 29, 2000 hearing. R2-Doc.69.

When Broward County responded to the discovery on or about April 10, 2000 they completely failed to respond to any of the Requests for Production stating as an answer to each request, "previously provided." R8-8;15- 9;8. Haliczer, Pettis & White had never provided any documents responsive to any discovery request made by Dr. King. This failure to respond precipitated Dr. King's Second Motion to Compel R2-Doc.75. Further during this period, Broward County produced three different copies of Dr. King's personnel file, each purporting to be her official file. R8-18;9- 24. Broward County misstated the existence and availability of documents. The County provided only one-side of copies of School Board Minutes which were two-sided and failed to produce the attachments to the School Board minutes. R8-19;4-13.

Based upon the information received from Broward County's prior counsel, Dr. King requested and Broward County agreed to produce the personnel file of Paula (Paulette) McClane. R4-145;2-3 FN2. Paula/Paulette McClane was a white female administrator who was given an end of the year performance evaluation of "Needs Improvement" the same year that Dr. King received an end of the year performance evaluation of "Needs Improvement." Dr. King required the McClane file to demonstrate that during the same time-frame non-black employees were being afforded the due process elements described in the Broward County Schools Policy Manual and mandated by Florida law, (R4-145;6 FN 4, R4-142;27-33,39) while the same processes were being denied Dr. King. The McClane file was never produced. R4-145;2-3 FN2. Broward County indicated that no file could be found for this employee, even though the name of the employee was provided to Dr. King by Broward County through its previous attorney, Carlton Bober. R4-145;16.

In 1994, the year following her final year at Markham, Dr. King worked at the Broward County office for Chapter One, a federal program as a "principal on assignment." R4-127;37[91-92]. Near the close of the school term, Dr. King was informed that Chapter One was "down-sizing." R4-127;42[110]. Though close to the end of the schoolterm, in about March of 1994, Dr. King sent a letter to the Superintendent requesting a meeting to discuss her options for the following year. R4-127;42[110]. Dr. King expressed a desire for another administrative appointment or a reappointment to an in-school principalship. R4-127;45[121]. However, unbeknownst to Dr. King, in April 1995, a list recommending positions for the coming year was provided to the School Board by the Superintendent. R4-127;43-46[115-125]. On this list, Dr. King, who from 1994-95 was a "principal on assignment" was listed under the category heading of Assistant Principals. R4-127;49-50[138-143], 46[125-127]. Although Dr. King was a "principal on assignment" her designation as "principal" was omitted and the listing only read "on task assignment." R4-127;50[141-144]. It is uncontested that Dr. King did not receive her evaluation prior to April 1995 and that she was never informed at any time of any prior to the filing of this lawsuit of any allegation that she was being disciplined or demoted.

It is uncontested that Dr. King was not provided an evaluation until June 1995. Dr. King was rated as "performing at a professional level" and through the entire year had maintained a classification as "principal on assignment." Dr. King has not discovered nor has Broward County produced any evidence that Dr. King's supervisor in 1995, Pearlie Crawford, either recommended Dr. King for a demotion or an assistant principal's position.

It is uncontested that Dr. King was not informed that she would be reassigned to an assistant principalship level position. Failure to provide her with her review by March 24, 1995, deprived Dr. King of sufficient time and notice to appeal the determination to the School Board at the April 11, 1995 meeting as required by School Board policy. R4-127;45-46[124-125].

But for the contested rating in 1994, Dr. King's year-end reviews were consistently "performing at a professional level," the highest possible performance rating. It is uncontested that at all times between 1993 and the present, Dr. King was qualified for a principalship position,[2] and Dr. King never received an "unsatisfactory" rating the lowest rating given to administrators on any evaluation. R4-127;47[130], R4-127;115-168.

In or about June, 1995, Dr. King was assigned to a position as an Assistant Principal at Silver Ridge Elementary School, but still at her principal's pay. R4-127;49[140]. According to Dr. King's continuing contract, the only existing contract between Dr. King and Broward County Schools, Dr. King could be appointed to a position where she was needed, but with no reduction in pay or position. R4-145;25.[3] In or about September and October 1995, Dr. King sought direct review of the placement at Silver Ridge from Frank Petruzielo, then Superintendent of Broward County Schools. R4-127;52[150-151]. Dr. King was informed by Dr. Petruzielo while he was employed as Superintendent of Broward County Schools, in the administrative offices of the Broward County Schools that she would be reinstated to a principal's position if she received a favorable review by the then principal of Silver Ridge Elementary, Marcia Pann. R4-127;53-54[156-158]. Lisa Maxwell, the executive Director of the Principal's Association, was present during this meeting and witnessed this discussion. R4-142;102.

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[2] The qualifications for Principalship are set out in the Policy handbook for the School Board of Broward County 4002.14.13.a and 14 (1))

On or about April 15, 1996, after receiving a favorable evaluation from principal Marcia Pann, Dr. King placed her name to be considered as principal of Silver Ridge Elementary and formally requested reinstatement to a principalship position in accord with what Dr. Petruzielo had previously indicated. R4-127;52[151], 53[153-156].

On or about May 21, 1996, Dr. King received a letter from the School Board of Broward County indicating that she was no longer under consideration for the position as principal of Silver Ridge Elementary. R4-127;54[158-159]. Although it is undisputed that Dr. King received a favorable review from the parting principal, Marcia Pann, she was still denied the position. The position was given to a less qualified white female. Prior to the 1996 school term, Dr. King was still receiving her Principal's salary. R4-127;54[159]. At the start of the 1996 school term, however, Dr. King's pay was reduced to Assistant Principal's level. Dr. King has made over twenty applications for a principal's positions. R4-127;60[181]. To date, Dr. King has not been returned to a principal's status or position. To date, Dr. King has not been provided any documentation from the School Board of Broward County stating that she was "demoted" or indicating what circumstances precipitated this alleged "demotion."

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[3] The terms of the contract are set out in R4-145.

Broward County moved for summary judgment alleging that no genuine issues of material fact existed such that the case should proceed to trial. R4-Doc. 126. Broward County's Motion contained no evidence to support its contentions that Dr. King had been "demoted" as would be required by the laws promulgated by the Florida legislature regarding Teachers and Administrators. Broward County contends that Dr. King was employed under an "annual contract" although they produced no documentation that contained the elements required by the Florida legislature to be an "annual contract," nor did Broward County produce any evidence that Dr. King's "continuing contract" had been modified by any voluntary relinquishment as is required under the terms of her contract and State Law. R4-145;25.

II. Proceedings below

The Magistrate Judge entered his Recommendation to grant the Summary Judgment Motion on February 16, 2001. On July 19, 2001 the District Court affirmed in all respects and entered its Summary Final Judgment for the School Board of Broward County and Frank Petruzielo.

On September 13, 2001 the District Court judge denied Dr. King's Motion to Reconsider.

On June 7, 2002, The eleventh Circuit Court of Appeals issued and order affirming the district court's summary judgment.

On October 10, 2002 the Court of Appeals denied Petitioner's Motion for rehearing en banc.

ARGUMENT IN SUPPORT OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

I. WHETHER THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT ASSIGNMENT LETTERS INDICATING THE PLACE AND SALARY OF A FLORIDA SCHOOL ADMINISTRATOR WERE CONTRACTS, EVEN THOUGH THE LETTERS DID NOT CONTAIN THE ELEMENTS OF AN ADMINISTRATOR CONTRACT AS PRESCRIBED BY FLORIDA LAW.

TRW Inc. v. Andrews, 534 U.S. ____, (2001) slip op., at 10-11, this Court states, "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Duncan v. Walker, 533 U.S. ____, ____(2001) (slip op., at 6)(internal quotation marks omitted). In the matter herein the Florida legislature has determined what constitutes a contract.

Florida State Law §231.36(1)(a) regarding Contracts with Instructional staff, supervisors and principals states:

"Each person employed as a member of the instructional staff in any district school system shall be properly certificated pursuant to s. 231.17 or s. 231.1726 or employed pursuant to s. 231.1725 and shall be entitled to and shall receive a written contract as specified in chapter 230. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. ..."

In this matter, the letters submitted by Broward County purporting to be "contracts" do not contain "provisions for dismissal during the term of the contract only for just cause." The letters used by Broward County and referred to as "Annual Contracts" do not, on their face even purport to be Contracts. (R4-127;110-120).

The district court improperly determined that Dr. King served under an Annual Contract. (R4-137;23-25) Dr. King, during all times relevant to this action was employed under a continuing contract which has been in place since 1973.(R4-145;25). From 1967 to 1972, Dr. King was employed under an Annual Contract. (R4-145;121-24) The Broward County Annual Contract form contains all of the elements required by Florida State Law. (R4-142;17,27)

The terms of the legislation are explicit, unambiguous and mandatory. The Appellate Court's statement that the letters are contracts is clear error. The Appellate court was compelled to either accept that Petitioner's 1973 continuing contract was in force and effect or that no contract existed at all.

The existence of a contract is the linchpin of Petitioner's Fourteenth Amendment due process claim which was improperly considered and decided due to the district court and Appellate court's improper determinations. The lower courts cannot "fill-in-the-blanks" and infer the existence of a contract on Respondent's behalf when no evidence of a contract has been provided by them.

Petitioner asks this court to grant writ of certiorari to review this question.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ISSUE A "DEATH PENALTY" SANCTION TO RESPONDENTS WHO FAILED TO RESPOND TO THE MOTION FOR DEFAULT JUDGMENT AND REPEATEDLY FAILED TO COMPLY WITH DISCOVERY REQUESTS EVEN AFTER LESSER SANCTIONS WERE IMPOSED.

On or about November 19, 2000 after Broward County had failed to respond to Dr. King's discovery which was due on or about October 20, 1999, Dr. King filed a Motion for Rule 37 Sanctions for Broward County's failure to respond to discovery as required in the Scheduling Order. When after 90 days no action had been taken on the Motion, and Broward County had not responded, Dr. King requested that the Court enter an order of default.

Broward County still however failed to respond to the Motion or produce the required discovery responses. Having failed to respond to the Motion, sufficient cause existed for granting the motion by default.

The Southern District of Florida Local Rules for Fed.R.Civ.P. 7.1 C. state:

Memoranda of Law. Each party opposing a Motion shall serve an opposing memorandum of law no later than 10 days after service of the motion as computed by the Federal Rules of Civil Procedure. Failure to do so may be deemed sufficient cause for granting the motion by default."

In *Pauley v. United Operating Company, 606 F.Supp 520 (E.D. Mich. 1985)* a default judgment was the Court's sanction for Appellee's failure to provide discovery responses. The *Pauley* court noted, "The Court's expectation that its discovery rulings will be obeyed is justified under the federal rules, which allow the Court to punish non-compliance with its discovery orders by ordering the striking out of pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. ...In lieu of the foregoing or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure...." Id at 526 (emphasis added).

In *Bankatlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1048 (11th Cir.1994)* "The standard of review for an appellate court in considering an appeal of sanctions under Rule 37 is sharply limited to an abuse of discretion and determination that the findings of the trial court are fully supported by the record." *Pesaplastic C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1519 (11th Cir.1986) See also Carlucci v. Piper Aircraft Corp., Inc. 775 F.2d 1440, 1446-47 (11th Cir.1985)* federal courts have broad discretion to impose sanctions for failure to comply with court orders. "To reverse the district court, we must be left with a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors."

In *Chilcut v. U.S., 4 F.3d 1313 (5th Cir. 1993)*, the Fifth Circuit Court noted "When parties present no valid objections to discovery and intentionally withhold properly requested information, courts have the authority to presume that the party's refusal to produce the information is an admission of the want of merit in the asserted defense." *Id at 1324.*

In *Hashemi v. Campaigner Publications, Inc., 737 F.2d 1538, 1538-9 (11th Cir.1984)* this Court noted, "While we agree that the sanction of dismissal is a most extreme remedy and one not to be imposed if lesser sanctions will do, *see Marshall v. Segona, 621 F.2d 763, 766-67 (5th Cir.1980)*, the district court retains discretion to dismiss a complaint where the party's conduct amounts to 'flagrant disregard and willful disobedience' of the court's discovery orders." In *Hashemi* the complainant failed to appear for a scheduled deposition and did not adequately explain his reasons for absenting himself from the scheduled deposition." *Id. at 1539.*

In this matter below, Broward County, in failing to respond to the Motion for Default Judgment equally failed to "adequately explain ...reasons" for failing to respond to the discovery. Further, even after the imposition of monetary sanctions, Broward County continued to fail and refuse to respond timely and fully to discovery after over a year of having made the requests.

The issue facing this Court is pointedly, "When does the court's acquiescence in the malfeasance of a party, after repeated and unheeded orders to compel and sanctions become and abuse of discretion?

In Rosen v. Thornburgh, 55 FEP Cases 580, 582 (2d Cir - New York - 1991) the Federal court in reversing an order of summary judgment noted:

> Also relevant to this inquiry is our recognition that employment discrimination is often accomplished by discreet manipulations and hidden under a veil of self-declared innocence. An employer who discriminates is unlikely to leave a 'smoking gun' such as a notation in an employee's personnel file, attesting to discriminatory intent. (citing *inter alia Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 ([51 FEP Cases 1881] 2d Cir. 1990) A victim of discrimination is therefore seldom able to prove his or her claim by direct evidence and is usually constrained to rely upon the cumulative weight of circumstantial evidence *(citing inter alia, Meiri v. Dacon,* 759 F.2d 989, 998 [37 FEP Cases 1728] (1985) *and Sweatt v. Miller Brewing Company,* 708 F.2d 655, 657 [32 FEP Cases 384] (11th Cir. 1983).

Due to these "discreet manipulations" discrimination Petitioners rely heavily upon fair and complete discovery to even procure the even the circumstantial evidence necessary to prove a claim.

In this matter it is clear from the District Court judge's order that the existence of the missing files and information sought by Petitioner, which were requested time and again were material to the maintenance and prosecution of Petitioner's case.

Because a true issue exists as to when a district court may repeatedly excuse discovery abuses and avoid the imposition of severe sanctions, after the imposition of lesser sanctions has failed, Petitioner asks this court to grant writ of certiorari to review this question.

III. WHETHER A DISTRICT COURT ABUSES ITS DISCRETION WHEN IT FAILS TO PROPERLY APPLY EVIDENTIARY LEGAL STANDARDS ON SUMMARY JUDGMENT.

Rule 56(b) states that:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time. move with or without supporting affidavit for summary judgment in the party's favor as to all or any part thereof.

One of the principal purposes of Rule 56 is to "isolate and dispose" of factually unsupported claims. *Celotex Corp. v. Calvett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

A summary judgment movant may discharge its burden by showing to the Court that there is an absence of evidence on the non-movant's case which is both essential and in regard to which the nonmovant bears the burden of persuasion. *Id.* 477 U.S. at 323. 106 S.Ct. at 2553. "The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion." *Allen v. City of Athens*, 937 F.Supp. 1531, 1533 (N.D.Ala. 1996.)

However, in *Jones v. Western Geophysical Co. of America*, 669 F.2d 280, 283 (5th Cir. 1982), the Court of Appeals sets out the standard with respect to summary judgment in the context of a Title VII case stating that, "The district court, when deciding whether to grant a motion for summary judgment, must view the evidence in the light most favorable to the party resisting the motion. (citing, *Joplin v. Bias*, 631 F.2d 1235, 1237 (5th Cir. 1980)). The Court continued stating that, "...summary judgment may be granted where the entire record, i.e., pleadings, depositions, interrogatories, etc., shows that no genuine issue of material fact exists. (citing, *Erco Industries, Ltd. v. Seaboard Coast Line Railroad Co., 644 F.2d 424, 428* (5th Cir. 1981)). "The mover," the court contends, "must bear the burden of proof, and all reasonable doubts as to the existence of the genuine issue of material fact have to be resolved against him. The fact that it appears that the nonmover is unlikely to prevail at trial or that the mover's facts appear more plausible are not reasons to grant summary judgment." (citing, *Hayden v. First National Bank,* 595 F.2d 994, 997 (5th Cir. 1979)). "The trial court has no duty to decide factual issues, only whether there is an issue of fact to be tried." (citing, *Foster v. Swift & Co.*, 615 F.2d 701, 702 (5th Cir. 1980)*).* "We have also instructed that summary judgment should be 'used cautiously' in Title VII cases." (citing, Hayden v. First National Bank, 595 F.2d at 997, quoting Lavin v. Illinois High School Association, 527 F.2d 58, 61 (7th Cir. 1975)).

With regard to the issue, the *Jones* Court notes, "Although we have occasionally approved summary disposition of certain employment discrimination cases, we agree with the Fourth Circuit that 'ordinarily summary disposition of Title VII cases is not favored, especially on a 'potentially inadequate factual presentation.'" (citing, *Logan v. General Fireproofing Co.*, 521 F.2d 102, 105 (4th Cir. 1963)).

As the matter before the Court is, among other things, an employment discrimination claim under Title VII, summary disposition is not favored. Additionally, although the burden of proof and persuasion ultimately fall on the Plaintiff in such actions, at the summary judgment phase, as stated hereinabove, the moving party bears the burden of articulating that no genuine issue of material fact exists and any reasonable doubt must be resolved in favor of the nonmovant, here Petitioner.

In making a determination on a Motion for Summary Judgment, after adequate discovery, all disputes of material fact must be resolved in favor of the nonmoving party, and all inferences that may reasonably be drawn from those facts must be construed in a light most favorable to [him]. Summary judgment is only appropriate where the only issue before the Court is a pure question of law. *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 176 (5th Cir. 1991.)

Plaintiff has made out a prima facie case. She has established (i) that "she" belongs to a racial minority; (ii) that "she" applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite "her" qualifications, "she" was rejected; and (iv) that , after "her" rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications." McDonnell Douglas v. Green, 411 U.S. 792, 802, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973.)

Petitioner below put forth testimony tending to support the contention that Black females were being singled out for discipline and in the form of "demotions" without due process. R4-132;66,104-107.

Lisa Maxwell, Executive Director of the Principals and Assistants Association in Broward County noted, that Dr. King was the first of about five black females to be subjected to this harsh treatment. R4-132;104-107,112-114,123-124.

A cause of action under 42 U.S.C. §1983 creates a cause of action for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision-making channels. *Hazel v. School Board of Dade County, Florida,* 7 F.Supp.2d 1349, 1354 (S.D.Fla. 1998), *citing Monell v. Department of Social Services of New York,* 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978.) In *Hazel,* the Court noted that there were two ways in which the Plaintiff could prove municipal liability, (1) Hazel could prove liability through the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute "custom or usage" with the force of law.

Dr. King has established through the testimony of Lisa Maxwell, the Executive Director of the Principals and Assistants Association, that Dr. Petruzielo had completely subverted the hiring process of the Broward County Schools. She indicated that "This particular superintendent made it perfectly clear , not just to me but to the board and also it's on public record in public minutes, that he considered the appointment of a principal and assistant principal strictly his per view (sic), that he made those personally, that he was the only person who made the choice or decision.... it was exclusively his arena..." (R4-132;5,15) When asked "Do you believe that the [actual] process [it underwent to come out with this evaluation we're looking at] was different based on race?, She answered , "Yes. I believe that this was the first incident of a change in the process, yes , I do." (R4-132;32-3), and that the process was targeted discriminatorily against African Americans.

She further noted that "During Dr. Petruzielo's tenure, there were two white individuals who reached a point where either they were threatened with termination or some other form of punishment, suspension, something along those lines. There were only two white individuals, one male and one female during that time period. There were, and I didn't bring my notes with me, but there were in excess of 11 African American individuals during the same timeframe. The women -- the vast majority of whom were women. The women were all interestingly enough, in their 27, 28th year of employment..." (See R4-132;61-63.)

As indicated by Lisa Maxwell, Petitioner was the first of many African Americans to be treated negatively by Dr. Petruzielo's hiring policies

The District Court judge, dismisses the testimony of Lisa Maxwell requiring specific statistical analyses which are not required at the Summary Judgment stage. Further, the district court errs in determining that Petitioner and a white female administrator were not "similarly situated" when both were subject to the same rules and Defendants put on no proof that the two were subject to differing rules or standards. (See App - , 10][4]. The Judge further states, "If an employer applies a rule differently to people it believes are differently situated, no discriminatory intent has been shown." Chescheir v. Liberty Mutual Insurance Co., 713 F.2d 1142, 1148 (5th Cir. 1983). However Respondents provided no evidence, testimonial or written that they "believed" Petitioner and Ms. McClane to be "differently situated."

The facts hereinabove vault the hurdle imposed *by St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 519, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993) wherein the Court states, "It is not enough in other words, to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Dr. King has established that the basis of her "demotion" was never provided to her. She has also established through the deposition testimony of Lisa Maxwell that a race bias was evident in the comparative disciplinary actions taken against white versus black Administrators during Dr. Petruzielo's tenure.

Dr. Petruzielo had clearly commandeered the hiring process of Administrators for Broward County.

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[4] The Judge further notes that the "evidence in support of the prima facie case is sorely lacking." which Petitioner suggests is due to the failure of the district court to compel Respondents to timely and fully respond to discovery before allowing the filing of dispositive motions.

The evidence clearly points to his hiring, retention and promotion policies as being the root of increased disciplinary action against African American Administrators.

Dr. Petruzielo was the final policymaker for the School Board. Broward County's arguments to the contrary are disingenuous and unsound. *Citing School Board of Collier County v. Steele*, 348 So.2d 1166 (Fla. 1st DCA 1977) *and Floyd v. Waiters*, 133 F.3d 786, 794 (11th Cir. 1998) the School Board argues that Petruzielo's only function is to recommend employment actions. But testimony by Lisa Maxwell runs counter to that assertion.

The Magistrate's Report and Recommendation, which was subsequently affirmed in its entirety by the District Court Judge and the Court of Appeals is rife with such statements. The Magistrate Judge, in too many instances to recount here, inferred the existence of evidence which was never introduced by Respondents in documentation or testimony.

The School Board functions by State Law and Board policy. Respondents have wholly failed to demonstrate that they have followed State Law and their own policies. The District Court, despite these apparent deficiencies granted summary judgment.

Because the School Board failed to follow its own policies, procedures and state law and because genuine issues of material fact existed as to the issues of racial discrimination and because the District Court ruled on the existence of facts not before it, this court should review the lower court's decisions and grant certiorari.

IV. WHETHER A DISTRICT COURT ABUSES ITS DISCRETION WHEN IT FAILS TO PERMIT A CASE TO PROCEED TO THE JURY WHEN A SPOLIATION ISSUE EXISTS.

When a discrimination Defendant has failed and refused to respond to discovery, even after the imposition of sanctions, and the District Court Judge, despite the severity of the failure has permitted the action to proceed, what should alternatives does the discrimination Plaintiff have? The Plaintiff has no true remedy by appeal because the information necessary to proving the claim was never provided during discovery. The Appellate Court states "Here, however, there is no alleged destruction or unexplained disappearance of crucial evidence. Although King asserts on appeal that defendants "indicated that no file could be found for [McClane]," she provides no record support for the assertion, and it therefore has no probative value. *See Leigh v. Warner Bros., Inc.,* 212 F.3d 1210, 1217 (11th Cir.2000). Thus a spoliation instruction was not warranted,..." However, there is record reference to Defendants statement that the file could not be found. See . R4-145;2-3 FN2; R4-145;16. But more importantly, the court focuses on "alleged destruction or unexplained disappearance." In a situation where a Plaintiff does not have access to documents and the documents are in the care, custody and control of Defendant, what benefit is there to the Plaintiff for the Court and the Defendant to say that the evidence was lost "by mistake." And certainly in a case such as the one below when the Defendants have a history of discovery abuses, a presumption that the documents have been secreted or made unavailable is not unlikely.

In the underlying case, Broward County has engaged in discovery practices which deprived Dr. King of timely and complete disclosure of information necessary to prosecute her claims.

The mere failure, without more, to produce evidence that naturally would have elucidated a fact at issue permits an inference that "the party fears [to produce the evidence]; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable tö the party." 2 Wigmore on Evidence, § 285 at 192 (Chadbourn rev. 1979). (*See also. Schmid v. Milwaukee Electric Tool Corp., 13 F.3d 76 (3d Cir.1994),* In deciding the proper penalty for the spoliation of evidence, the Third Circuit found relevant" "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." Dr. King has been denied timely and complete access to properly requested discovery. Further, Broward County's actions in failing and refusing to deliver documents as ordered by the court frustrated Dr. King's attempts to procure names of witnesses, personnel files and information from the minutes of the Board meetings. (See e.g. R6,R7 & R8 - Transcripts of hearings on motions to compel.) Because Broward County's actions were pervasive and repetitive, the court must view them as intentional. In *Caparotta v. Entergy Corporation, 168 F.3d 754, 758-762 (5th Cir.1999)* the dissent discusses the spoliation doctrine with regard to destruction and non-production of documents. "The general principles governing the admissibility of evidence of the destruction or nonproduction of documents and the permissible inference that may be drawn therefrom are well established. *See Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214 (1st Cir.1982)*;... A party's intentional nonproduction or destruction of a relevant document is evidence from which a jury may infer that its contents would have been unfavorable to that party, provided that the party had notice that the document was relevant to pending or foreseeable litigation at the time he destroyed or failed to produce them." Without production of the file of Paulette McClane, a file which is within the possession, custody and control of Broward County, and considering the proceedings below and Broward County's consistent failure to produce documents and false statements with respect to the discovery, the Court must presume spoliation and that the content of the file would have been adverse to Broward County.

Dr. King was severely prejudiced by the failure to produce complete discovery, including but not limited to the McClane file. In such cases, where a history of discovery abuses exists, summary judgment is inappropriate. The aggrieved responding party should have the benefit of trail by jury and a negative inference instruction.

Because the inherent fairness of the judicial system is at issue, Petitioner asks this court to grant writ of certiorari to review this question.

CONCLUSION

Because the courts hereinbelow improperly interpreted and applied the law regarding statutory construction, the evidentiary rules underlying summary judgment and rules regarding discovery sanctions, this Court should grant certiorari to establish the proper interpretation, and reverse all orders of the Courts that occurred as a result of the improper statement and interpretation of law.

The petition for writ of certiorari should be granted.

January 8, 2003

Nadine R. King-Mays
Counsel for Petitioner

No. ______________________________

IN THE
SUPREME COURT OF THE UNITED STATES

WILHELMINA G. KING,
Petitioner

v.

SCHOOL BOARD OF BROWARD COUNTY AND
FRANK PETRUZIELO
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEAL;S
FOR THE ELEVENTH CIRCUIT

No. 01-15861
Non-Argument Calendar

D.C. Docket No. 99-06059-CV-SH

FILED U.S. COURT OF APPEALS
ELEVENTH CIRCUIT June 07 2002
THOMAS K. KAHN CLERK

WILHELMINA G. KING
Plaintiff-Appellant,

Versus

SCHOOL BOARD OF BROWARD COUNTY,
FRANK R. PETRUZIELO,
Defendants-
Appellees.

Appeal from the United States District Court for
the
Southern District of Florida

(June 7, 2002)
Before CARNES, BARKETT, and WILSON,
CIRCUIT JUDGES.

PER CURIAM:

Wilhelmina King filed a complaint against defendants, alleging violation of Title VII and the Fourteenth Amendment, inter alia, for demoting and failing to promote her because she is a black female. King filed a motion to compel and for default judgment pursuant to Rule 37 after defendants failed to produce requested documents. The magistrate judge ordered defendants to produce the documents but denied King's motion for Rule 27 sanctions. The defendants then moved for summary judgment. The magistrate judge recommended that the motion be granted, and the district court adopted the recommendation in its entirety.

I. FAILURE TO ENTER A DEFAULT JUDGMENT

King challenges the magistrate judge's decision not to enter a default judgment under rule 37. Because magistrate judges do not have the authority to decide dispositive motions, see 28 U.S.C. §636(b)(1)(A), we treat the magistrate judge's denial of King's motion for a default judgment as a nullity and consider that motion to have remained pending until the district court granted summary judgment in favor of defendants on all claims, impliedly denying the motion, see Addington v. Farmer's elevator Mut. Ins. Co., 650 F.2d 663, 666 (5th Cir. July 1981). We review the district court's decision to deny King's motion for a default judgment only for abuse of discretion. See Chudasama v. Mazda Motor Corp., 123 F.3D 1353, 1366 (11th Cir. 1997).

King contends that a default judgment was warranted under Rule 37, because the defendants failed to respond to her November 19, 1999 motion to compel and for Rule 37 sanctions, and because they failed to sufficiently respond to her previous discovery requests. Rule 37 provides in relevant part that: "If a party ...fails to obey an order to provide or permit discovery ...the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: ... (C) An order ...rendering a judgment by default against the disobedient party." Fed.R.Civ.P.37(b)(2)(emphasis added). We have held that "[v]iolation of a discovery order caused by simple negligence, misunderstanding, or inability to compel will not justify a Rule 37 default .... Moreover, a district court abuses its discretion under Rule 37(b)(2) if it enters a default when less draconian but equally efficient sanctions were available." Chudasama, 123 F.3d at 1371 (internal quotation marks and citations omitted).

Although King is correct noting that defendants did not respond to her November 19, 1999 motion, she is incorrect in contending that the district court abused its discretion in not deciding to enter a default judgment. King's November 19 motion was her first such motion, and when the defendants failed to respond to it, the court availed itself of the less extreme sanction of awarding attorney's fees. The defendants then became responsive[1] They filed a motion for relief from the award of attorney's fees, in which they informed the court that they had already produced the requested documents and contended the attorney's fees were not warranted. After a hearing, the district court vacated its attorneys fees award and instead ordered the defendants to pay King's expenses incurred for the hearing. Evidence in the record shows that the defendants then attempted to produce the documents requested by King. The defendants did not produce all the requested documents in a timely manner, but they claim their failure was due to their inability to attain the documents more readily, and King provides no evidence to the contrary. Therefore, the district court did not abuse its discretion by denying King's motion for the extreme measure of default judgment.

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[1] Although the defendants mow contend that they changed counsel and that their new counsel never received King's motion to compel and for Rule 37 sanctions, we note that they did not include that contention in their motion for relief from the attorney's fees.

II.

II. SUMMARY JUDGMENT

A. SPOLIATION

King contends that the district court erred in granting summary judgment because she was entitled to a spoliation instruction . We disagree.

Although "evidence related to the history of pretrial discovery conduct should normally nor be a matter submitted for the jury's consideration on the issues of liability," such evidence may be admitted where "the misconduct alleged is the destruction or unexplained disappearance of crucial evidence." Strasser v. Yalamichi, 783 So.3d 1087, 1093 (Fla.4th DCA 2001)(internal quotation marks, citations, and brackets omitted), review denied, 805 So.2d 810 (Fla. 2001); see also Amlan, Inc. v. Detroit Diesel Corp., 651 So.2d 701,703(Fla.4th DCA 1995). Under those circumstances, a spoliation of evidence instruction may be given to the jury. See Amlan, Inc., 651 So.2d at 703.

Here, however, there is no alleged destruction or unexplained disappearance of crucial evidence. Although King asserts on appeal that defendants "indicated that no file could be found for [McClane]," she provides no record support for the assertion, and it therefore has no probative value. See Leigh v.

Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir.2000). Thus a spoliation instruction was not warranted, and the district court did not err. See Moghari v. Anthony Abraham Chevrolet Co., 699 So.2d 278, 279 (Fla.3d DCA 1997) (holding it was error for trial court to give jury spoliation instruction where there was no spoliation in fact.)

B. UNLAWFUL DEMOTION AND FAILURE TO PROMOTE

King argues irrespective of the spoliation issue, the district court erred in granting summary judgment in favor of defendants on her unlawful demotion and failure to promote claims and her due process claims.[2] We review de novo a grant of summary judgment, applying the same legal standards as the district court. See Info.Sys. & Networks Corp v. City of Atlanta, 281 F.3d 1220, 1224 (11th Cir. 2002).

For the reasons discussed in the magistrate judge's report and recommendation of February 16, 201 adopted in its entirety by the district court on July 19, 2001, we conclude that King's unlawful demotion and failure to promote claims were properly dismissed. We also conclude that King's due process claim was properly dismissed for the reasons set forth in the magistrate judge's report and recommendation, but we find it necessary to ad the following.

King contends that she was under a continuing contract, and therefore has a property interest, but fails to put on evidence of that contract. While there was a 1973 continuing contract when she was a teacher, that contract does not apply to administrators. The defendants have put forth evidence of King's annual contracts for the time period in which she was an administrator, in the form of letters specifying the assignment, the duration of the assignment, and the salary for each assignment. Those letters constitute contracts under Florida law. See Story v. Culverhouse, 727 So.2d 1128, 1130 (Fla. DCA 1998). Further, King testified at her deposition that she had been informed that as an administrator she was subject to an annual contract. For these reasons, King has failed to establish a viable due process claim, and we affirm the court's grant of summary judgment.

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[2] The district court granted summary judgment on King's contractual claims and First Amendment claim. Because King does not address those claims on appeal, we consider them to be waived. See Stepak v. Addison, 20 F.3d 398, 412(11th Cir.1994).

III. CONCLUSION

For the foregoing reasons, the district court's decision not to enter a default judgment pursuant to Rule 37 is AFFIRMED, and the district court's grant of summary judgment in favor of the defendants is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 996059- CIV-HIGHSMITH/GARBER

WILHELMINA G. KING,
Plaintiff,

CLOSED CIVIL CASE

v.

Filed by
/s/____
JUL 19 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT
S.D. OF FLA. -MIA

THE SCHOOL BOARD OF
BROWARD COUNTY, FLORIDA,
and FRANK R. PETRUZIELO,
Defendants.

SUMMARY FINAL JUDGMENT

THIS CAUSE came before the Court upon the Report and Recommendation issued by Magistrate Judge Barry L. Garber on February 16, 2001. Therein, Magistrate Judge Garber recommends that the defendant's motion for summary judgment be granted in its entirety. Also before the Court are the plaintiff's objections to the Report and Recommendation, filed on July 3, 2001 pursuant to an extension of time granted by Order dated March 5, 2001, and the defendants' response thereto.

Upon a de novo review of this matter, it is ORDERED AND ADJUDGED that Judge Barry L/ Garber's Report and Recommendation is AFFIRMED AND adopted in its entirety.
Accordingly, it is further

ORDERED AND ADJUDGED that the Defendants The School Board of Broward

County, Florida and Frank R. Petruzielo's motion for summary judgment is GRANTED and summary final judgment is hereby ENTERED against Plaintiff, Wilhelmina G. King as to all counts of the third amended complaint. Therefore, it is further

ORDERED AND ADJUDGED that Plaintiff Wilhelmina G. King SHALL TAKE NOTHING by this action from Defendants the School Board of Broward County, Florida and Frank R. Petruzielo and that said defendant SHALL GO HENCE WITHOUT DAY. The Court reserves jurisdiction to address any appropriate motions for costs and/or attorneys' fees, which shall be filed in accordance with Local Rule 7.3. All pending motions not otherwise ruled upon are DENIED as moot and this case is CLOSED.

DONE AND ORDRED in the Chambers, at Miami, Dade County, Florida this 19th day of July, 2001

/s/
SHELBY HIGHSMITH
UNITED STATES DISTRICT
JUDGE

cc: Magistrate Judge Garber
Nadine R. King-Mays, Esq.
Eugene Pettis, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 996059- CIV-HIGHSMITH/GARBER

WILHELMINA G. KING,
Plaintiff,

v.

Filed by
/s/____
SEP 13 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT
S.D. OF FLA. -MIA

THE SCHOOL BOARD OF
BROWARD COUNTY, FLORIDA,
and FRANK R. PETRUZIELO,
Defendants.

ORDER

THIS CAUSE came before the Court upon Plaintiff Wilhelmina G. King's motion for reconsideration of the Summary Final Judgment entered by the Court on July 19, 2001. Upon review of the plaintiff's motion and defendant's response thereto, it is

ORDERED AND ADJUDGES that the motion for reconsideration is DENIED/

DONE AND ordered in Chambers, at Miami, Dade County, Florida, this 13 day of September, 2001.

/s/____________
SHELBY HIGHSMITH
UNITED STATES DISTRICT
JUDGE

cc: Magistrate Judge Garber
Nadine R. King-Mays, Esq.
Eugene Pettis, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 996059- CIV-HIGHSMITH/GARBER

WILHELMINA G. KING,
Plaintiff,

v.

Filed by
/s/____
2001 FEB 16 AM11:40
CLARENCE MADDOX
CLERK U.S. DIST. CT
S.D. OF FLA. -MIA

THE SCHOOL BOARD OF
BROWARD COUNTY, FLORIDA,
and FRANK R. PETRUZIELO,
Defendants.

REPORT AND RECOMMENDATION

THIS MATTER is before the Court on Defendants' Motion for Summary Judgment [DE#126], pursuant to an Order of Reference entered by the Honorable Shelby Highsmith. For the reasons that follow the undersigned recommends that Defendants' Motion be GRANTED in its entirety.

BACKGROUND

Plaintiff, Wilhemina G. King, is an African-American female currently employed as an assistant principal by Defendant, the School Board of Broward County, Florida (hereinafter, "School Board"), at the Silver Ridge Elementary School. See Pl.'s Dep. at 5. Plaintiff has been employed by the School Board for more than three decades. Id. Prior to her current position, Plaintiff was employed as a principal by the

School Board for the school years of 1988-1994 at the Robert C. Markham Elementary School. Id. at 6. She initially was an acting principal, then was

promoted to interim principal and finally to full-time principal. Id. During her first year at Markham

Elementary School, Plaintiff completed the Principal Internship Program. Id. at 28-29. During her employment as principal at Markham Elementary School, Plaintiff was told that she was hired on an annual contract basis. Id. at 21. Additionally, Plaintiff received two evaluations during each year that she was a principal: a mid-year review and a final, end-of-year review. Id. at 26; see also Defs. Ex. C. These evaluations reflected whether the evaluatee was "Performing at a Professional Level," or at a "Needs Improvement in Professional Performance" level. As further detailed below, Plaintiff received an overall evaluation of "Performing at a Professional Level," for the years 1988 through 1991. She received an overall evaluation of "Needs Improvement" on her 1992-1993 mid-year report. She then received overall evaluations of "Performing at a Professional Level" for the end-of year report for 1992-1993 and for the mid-year report of 1993-1994. Subsequently, Plaintiff received a "Needs Improvement" overall evaluation for her end-of-year report for 1993-1994. See Defs. Ex. C.

By the spring of 1994, Plaintiff states "that she might have been on the verge of being burned out." Pl.'s Dep. at 91-92. She decided that she "want[ed] to take a hiatus away," and informed the Area Superintendent that she would like to do something different that was still in line with her work as a principal. Id. at

91. Plaintiff was asked if she wished to become involved with the Chapter One Parent Involvement Program, and she voluntarily agreed to be assigned as a principal on task assignment for the 1994-1995 school year. Id. at 93-94. She states that she was "delighted with the idea." Id. at 106. While with the Chapter One Program, Plaintiff received a mid-year and a final evaluation. See Defs. Ex. E. In both, she received an overall evaluation of "Performing at a Professional Level." Said evaluations, however, did note a number of areas in which Plaintiff needed improvement. See Pl.'s Dep. at 95-102.

In early 1995, Plaintiff discovered that her position with the Chapter One Program would not be available for the subsequent school year, apparently due to downsizing. See Pl.'s Dep. at 93-94. Sometime in May of 1995, Plaintiff was informed that she had been assigned to the position of assistant principal. Id. at 116; see also Defs. Ex. F. A letter from the School Board to Plaintiff, dated June 23, 1995, indicates that she was placed as an assistant principal at the Silver Ridge Elementary School for the school year 1995-1996, effective August, 1995. See Defs. Ex. G.

Plaintiff reported to Silver Ridge Elementary School as an assistant principal in the fall of 1995, for the 1995-1996 school year. She also met twice with Defendant Frank Petruzielo, then the Superintendent of the Broward County School Board, in September and October of 1995, to discuss her demotion to assistant principal. See Pl.'s Dep. at 147-48. Plaintiff asserts that Petruzielo "assured" her that if she received a positive evaluation at Silver Ridge she would receive a principalship. Id. at 149. Defendant Petruzielo also advised

Plaintiff that he would speak to various colleagues and administrators in order to investigate the demotion. Id. In a letter to Defendant Petruzielo, dated April 15, 1996, Plaintiff wrote that she hoped that he would consider her request to be placed as a principal. See Defs. Ex. 1. Plaintiff also applied for a position as principal at Silver Ridge Elementary School on or about April 15, 1996. See Third Am. Compl. ¶ 25. She did not receive the promotion.

After receiving a positive "Performing at a Professional Level" evaluation for her work as assistant principal during the school year of 1995-1996, Plaintiff was reassigned to Silver Ridge Elementary School as an assistant principal for the following year. Her salary, which had been protected at the principal's rate for the 1995-1996 school year, was reduced to that of an assistant principal. See Pl.'s Dep. at 159; Third Am. Compl. ¶ 35.

Between 1995 and the present, Plaintiff has applied for at least eleven principal positions. See Pl.'s Dep. at 171, 181; Third Am. Compl. ¶ 26. Plaintiff asserts that sometime in the summer of 1997, Mark Seigle, the Associate Superintendent for Personnel, telephoned her and advised her that he had spoken with Defendant Petruzielo and that Defendant Petruzielo had asked him to contact her to tell her that she should apply for open principal positions. See Pl.'s Dep. at 173. Plaintiff apparently received two or three interviews before area directors and their designees in response to her applications for a principal position. Id. at 181. To date, Plaintiff has not been selected for a principal position.

Plaintiff subsequently filed a complaint with the Equal Employment Opportunity

Commission ("EEOC"), alleging that she had been demoted without notification, and that she had applied for various principalships since 1995, but had not been selected because of her race. See Pl.'s Dep. at 169. She asserts that her unsuccessful application for a principalship at Plantation Elementary School prompted the filing of the complaint. See id. at 172-73. In November, 1998, Plaintiff received her Right to Sue notice from the EEOC. See Third Am. Compl. 1 45.

Plaintiff filed suit against Defendant School Board in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The instant action was removed to this Court on January 15, 1999. The First Amended Complaint was filed on February 19, 1999, adding Petruzielo as a Defendant, and alleging violations of Plaintiff's constitutional rights under the Fourth and Fourteenth Amendments to the Constitution. On June 8, 1999, Plaintiff filed the Second Amended Complaint, alleging violations under 42 U.S.C. § 1981, 42 U.S.C. § 1981 a, 42 U.S.C. § 1983, and 42 U.S.C. § 2000e et sea.., as well as violations of Plaintiffs First, Fifth and Fourteenth Amendment rights. Plaintiff's Third Amended Complaint was subsequently filed on September 29, 1999. By Order of October 25, 1999, adopting in its entirety the September 27, 1999 Report and

Recommendation of the undersigned, the Court dismissed all claims against Defendant, Frank R. Petruzielo, in his official capacity. The Court also dismissed all claims under 42 U.S.C. § 1983 against Defendant School Board, to the extent that said claims rely on the theory of respondeat superior, and all claims founded upon violations of the Fourteenth Amendment stemming from Plaintiff's expectancy interest in a prospective promotion. By Order of January 4, 2000, adopting the November 30, 1999 Report and Recommendation of the undersigned, the Court dismissed Counts VIII, IX (denoted as Count XIV in the Third Amended Complaint) and XI.

In Counts I, II, III and X of the Third Amended Complaint, Plaintiff asserts that Defendants, the School Board and Frank R. Petruzielo, violated her constitutional rights under 42 U.S.C. § 1981, 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq. in demoting her from a principal position, and in failing to reinstate her to principalship status.

In Counts 11 and VII, Plaintiff asserts that Defendants violated her Fourteenth Amendment right to due process and her rights under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 through their alleged failure to reinstate her to the position of principal.

1n Counts IV and VII, Plaintiff asserts First Amendment violations by Defendants, in the reduction of her pay and status to that of an assistant principal.

In Count V, Plaintiff asserts that Defendant Petruzielo tortiously breached a verbal contract in failing to restore her to a principal position. In Count VI (denoted as Count IV in the Third Amended Complaint), Plaintiff asserts that she detrimentally relied on a statement by Defendant Petruzielo, and suffered damages as a result.

Defendants have moved to dismiss all of Plaintiffs claims on summary judgment. With regard to Plaintiff s claims of racial discrimination, Defendants assert that Plaintiff fails to establish a prima facie case, and also fails to rebut legitimate, non-discriminatory reasons proffered by Defendants. With regard to Plaintiff's due process claims, Defendants assert that Plaintiff does not possess a property interest or right so as to entitle her to notice and a hearing. With regard to Plaintiff's First Amendment claims, Defendants assert that Plaintiff fails to satisfy the test that has been laid out by the United States Supreme Court and by this Circuit in order to prevail on said claims. With regard to Plaintiff's claims of breach of contract and detrimental reliance, Defendants assert that Plaintiff fails to state a valid claim upon which she can recover. Additionally, Defendants assert the defense of qualified immunity.

STANDARD OF REVIEW

The purpose of a summary judgment motion is to assess whether trial is necessary. In deciding a summary judgment motion, the Court must apply the standard set forth in Federal Rule of Civil Procedure 56(c), which states in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together, with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The party seeking summary judgment bears the initial burden of persuasion to demonstrate that there is no genuine dispute as to any material fact in the case. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried.

Fed. R. Civ. P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves." Celotex, 477 U.S. at 324. The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty, Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only facts from which a reasonable jury could return a verdict for the nonmoving party will preclude the entry of summary judgment on a properly supported motion for summary judgment. Id. However, summary judgment should not be entered if, viewing the evidence in a light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party. Id. at 252.

DISCUSSION

Plaintiff claims that she was unlawfully demoted and denied reinstatement by Defendants, in violation of 42 U.S.C. § 1983 and 42 U.S.C. § 2000e et seq. Specifically, Plaintiff contends that she was demoted because she is an African-American female. She also contends that while she applied for at least eleven principal positions following her demotion, she was not hired or promoted to those positions because of her race.

The parties concur that in a case such as this alleging disparate treatment, in which § 1983 is employed as a remedy for the same conduct challenged under Title VII, "the elements of the two i causes of action are the same. " 'Richardson v Leeds Police Dep't, 71 f.3D 801, 805 (11th Cir.1995) (citations omitted). Identical methods of proof are employed. Id. Plaintiff bears the ultimate burden of proving that the Defendants intentionally discriminated against her. Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1375 (11" Cir. 1996). As detailed in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and refined in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), Plaintiff must first establish a prima facie case, which raises a presumption that the employer's decision was more likely than not based upon an impermissible factor. McDonnell Douglas Corp., 411 U.S. at 802. If Plaintiff can establish a prima facie case, the burden then shifts to Defendants to produce a legitimate, non-discriminatory reason(s) for the challenged action. Id. It should be noted that Defendant's burden in this regard is exceedingly light. Moreover, it is a burden of production, not persuasion. Standard v. A.B.E.L. Servs.. Inc., 161 F.3d 1318, 1331 (11" Cir. 1998). Defendants need only produce evidence that could allow a rational fact-finder to conclude that the challenged action was not made for a discriminatory reason. Id. Once Defendants have met their burden of production, Plaintiff must establish that Defendants' proffered reason(s) is merely a guise for intentional discrimination. Mulhall v. Advance Security. Inc., 19 F.3d 586, 597-98 (11" Cir. 1994) (stating that a plaintiff "must prove discriminatory intent" on the part of the Defendant). Plaintiff must produce evidence sufficient to enable a fact-finder to conclude that Defendants' stated reasons "were not its true reasons, but were a pretext for discrimination." Hinson v. Clinch County, Georgia

Board of Education, 231 F.3d 821, 829 (11'" Cir. 2000). She must, therefore, do more than show proof of a prima facie case to avoid summary judgment on this issue. See Weaver v.

Tech Data Corp., 66 F.Supp.2d 1258, 1269 (M.D. Fla. 1999) (citations omitted). "A plaintiff may prove pretext either directly, by persuading a court that a discriminatory reason more likely than not motivated the defendant employer, or indirectly, by showing that defendant employer's proffered reasons are unworthy of credence." Mayfield, 101 F.3d at 1376 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

1. Plaintiff's Claims of Racial Discrimination

A. Discriminatory Demotion

With regard to her claims of unlawful demotion, under the McDonnell Douglas analytical framework, Plaintiff must first establish a prima facie case of unlawful discrimination. Here, Plaintiff must establish that: 1) she is a member of a protected class; 2) she suffered an adverse employment decision; 3) the employer treated similarly situated employees more favorably, and; 4) Plaintiff was qualified for the job or benefit at issue. Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 842-43 (11`° Cir. 2000); see also Holifield v. Reno, 115 F.3d 1555, 1562 (11 " Cir. 1997). As grounds for her prima facie case of discriminatory demotion, Plaintiff asserts that she is a member of a protected class as an African-American woman, she suffered an adverse employment decision in being demoted from principal, Defendants treated non-minority employees more favorably, and Plaintiff was qualified for the job or benefit at issue.

Defendants do not dispute that Plaintiff is a member of a protected class or that she suffered an adverse employment decision. However, Defendants do dispute the third prong of Plaintiffs prima facie test, namely, whether similarly situated non-minority employees were treated more favorably. Specifically, Plaintiff asserts that Paulette McClane, a white female, who also received a "Needs Improvement" on her final evaluation in 1994, was moved from the principalship of a middle school to the principalship of an elementary school. See Plaintiff's Response Opp'n Summ. J. at 5 ("Pl.'s Resp."). Plaintiff adds that McClane's transfer is "clearly not the same as being reduced from a principalship to an assistant principalship without notice and a more severe loss of pay." Id. Defendants rebut that McClane is not similarly situated to Plaintiff. See Defs. Reply at 2.

Evidence of similarly situated employees is necessary to satisfy Plaintiff's prima facie case. This aspect is satisfied if.

> [T]he plaintiff shows that [she] and the employees are similarly situated in all relevant aspects ... [citations omitted]. In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.

Holifield, 115 F.3d at 1562. Crucial factors are the nature of the offenses committed and the nature of the punishments imposed. Id. (citations omitted).

While Plaintiff identifies McClane as a similarly situated employee who received more favorable treatment, Plaintiff s evidence in support of her prima facie case is sorely lacking. Plaintiff fails to specify the type of conduct engaged in by McClane, other than a cursory statement that McClane also received a "Needs Improvement" review. Furthermore, there is no indication that the areas in which McClane needed improvement were identical to the areas in which Plaintiff was found to need improvement by her evaluators. There is also no evidence in the record that McClane received any less than positive evaluations prior to 1994. See Nix v. WLCY Radio /Rahall Communications, 738 F.2d 1181, 1186 (11" Cir. 1984) (finding that plaintiff failed to establish prima facie case when he failed to established that he was fired while his co-worker was retained for nearly identical conduct). The Court further notes that McClane and Plaintiff had dissimilar jobs in that McClane was a middle school principal, while Plaintiff was an elementary school principal. "If an employer applies a rule differently to people it believes are differently situated, no discriminatory intent has been shown." Chescheir v. Liberty Mutual Ins. Co., 713 F.2d 1142, 1148 (5" Cir. 1983). Accordingly, Plaintiff has failed to establish a prima facie case.

However, in an abundance of caution and in order to provide a full factual record, this Court

will proceed with the McDonnell Douglas analysis. Assuming, and again the Court does not do so, that Plaintiff has established a prima facie case of discriminatory disparate treatment, Defendants now may rebut this presumption by proffering legitimate, non-discriminatory reasons for Plaintiff's demotion. As stated above,, Defendants do not have to prove the proffered reasons, but simply produce them. Defendants assert that in her position as a principal at Markham Elementary School, Plaintiff was responsible for the administration of said school, the supervision of the instruction therein, and leadership in the development and implementation of school improvement plans. See Defs. Mot. Supp. Summ. J. at 3.

Defendants contend, however, that Plaintiff's performance evaluations in the several years prior to her demotion to an assistant principal position indicate ongoing deficiencies with Plaintiff's supervision, leadership and administrative capabilities. Id. at 4. They further contend that these problems are disclosed through the work evaluations received by Plaintiff.

From 1988 through 1995, Plaintiff received mid-year and end-of-year performance evaluations. For all but one of the school years of 1988-1994, Plaintiff was evaluated by her supervisor Lorette David. For the school year 1990-1991, Plaintiff was evaluated by administrative official Francis Haithcock. These evaluations rated Plaintiff in the following twelve categories: 1) Planning and Organizing; 2) Delegation; 3) Adaptability; 4) Initiative and Productivity; 5) Communication; 6) Analysis; 7) Decision Making/Judgment; 8) Sensitivity and Interpersonal Skills; 9) Individual and Group Leadership; 10) Technical and Professional Knowledge; 11) Development of Personnel, and; 12) Commitment to Mission. There are two ratings for each of these categories which are shown on the individual evaluation forms for Plaintiff. These are: 1) "Performing at a Professional Level" and 2) "Needs Improvement in Professional Performance." With regard to overall ratings, the following four categories appear on the evaluation forms: Performing at a Professional Level, Needs Improvement in Professional Performance, Unsatisfactory Level of Performance, and Exceptional Performance.

During her first year as principal at Markham Elementary School, the school year of 19881989, Plaintiff received "Performing at a Professional Level" ratings in all twelve categories, in both her mid-year and her final, end-of-year evaluations. See Defs. Ex. C. For the school year of 19891990, Plaintiff again received a "Performing at a Professional Level" rating in all twelve categories in her mid-year evaluation. However, in the final, end-of-year evaluation for 1989-1990, Plaintiff received one "Needs Improvement" in the category of Planning and Organizing. Specifically, the evaluator noted that Plaintiff needed to improve her budgeting skills and the quality and timeliness of her reports. See id. For the school year of 1990-1991, Plaintiff received "Performing at a Professional Level" ratings in all but two categories in her mid-year evaluation. She received a "Needs Improvement" in the Planning and Organizing category and in the Analysis category. See id. The evaluator noted that Plaintiff had failed to properly plan the allocation of resources and to pay bills in a timely fashion, and that a deficit budget had resulted for the second year. More positively, the evaluator also noted that Plaintiff showed enthusiasm in trying new pilot programs, and had displayed sensitivity in providing ongoing in-service for staff, and was committed to the goals of the Broward County school system. See id. Plaintiff had no "Needs Improvement" ratings in her final end-of-year evaluation for the school year 1990-1991, receiving "Performing at a Professional Level" ratings in all twelve categories. Again, the evaluator noted King's sensitivity in working with staff and her enthusiasm in developing new student programs.

With respect to the mid-year evaluation for the school year, 1991-1992, King received a "Needs Improvement" rating in two areas: Planning and Organizing and Development of Personnel. The evaluator noted that there had been exceptions on the Internal Accounts and

Payroll Audit. The evaluator also commended King for obtaining more grants for Markham Elementary School than any other school received. Regarding her final end-of-year evaluation, Plaintiff received the same "Needs Improvement" rating in the same two categories. The evaluator noted again that there had been exceptions on the Internal Accounts and Payroll audit, and that too large a balance had been left in the school's regular budget. See id. The evaluator further noted that Plaintiff needed to continue to work with staff to improve their performance. She also praised the "many innovative" programs that had been set up for students. Id.

The mid-year evaluation for 1992-1993 appears to mark a decline in Plaintiff s overall rating. For the first time, she received an overall evaluation of "Needs Improvement" instead of a rating of "Performing at a Professional Level." Specifically, Plaintiff received "Needs Improvement" ratings in the Planning and Organizing, Decision Making/Judgment, Individual and Group Leadership and Development of Personnel categories. The evaluator noted late and inaccurate reports, a failure to monitor the budget and to spend funds wisely. She also noted that the computer labs failed to function in a timely fashion. Plaintiff wrote on this evaluation that the problems noted had been corrected and would be reflected in future observations. See id.

For the final, end-of-year evaluation for 1992-1993, Plaintiff received an overall rating of "Performing at a Professional Level." With respect to the individual categories, she received "Needs Improvement" ratings in Planning and Organizing, Decision Making/Judgment, Individual and Group Leadership and Development of Personnel. The evaluator noted that King worked hard and was very positive and enthusiastic, but needed to be more organized and develop better staff. See id.

In her last year as principal at Markham Elementary School, Plaintiff received an overall evaluation of "Performing at a Professional Level" in her mid-year review. She did receive "Needs Improvement" ratings in the categories of Analysis, Decision Making/Judgment, Individual and Group Leadership and Development of Personnel.

Subsequently, in the final, end-of-year evaluation for the 1993-1994 school year, Plaintiff received an overall rating of "Needs Improvement." Specifically, she received "Needs Improvement" ratings in the categories of Planning and Organizing, Analysis, Decision Making/Judgment, Individual and Group Leadership, and Development of Personnel. The evaluator noted that Plaintiff had repeated numerous audit exceptions, approved excessive overtime for the bookkeeper, didn't allocate funds properly, needed to make decisions in a more timely manner, and needed to do a better job in uniting the staff and administration and in selecting personnel and managing the poor performances of staff members. On a more positive note, the evaluator commended King's enthusiasm and her work in commencing multiple reading programs and activities.

Subsequent to this evaluation, King moved to the Chapter One Parent Involvement Program on Task Assignment. See Defs. Ex. D. While with the Chapter One Program, Plaintiff received a mid-year evaluation and a final, end-of-year evaluation from her supervisor, Pearlie Crawford, the Acting Director of Special Programs. In her mid-year evaluation for the school year 1994-1995, Plaintiff received an overall rating of "Performing at a Professional

Level." She received a "Needs Improvement" in four categories: Initiative and Productivity, Analysis, Individual and Group Leadership, and Decision Making/Judgment. The evaluator noted a lack of good judgment and sound decisions, a need to take on more individual leadership in moving the Chapter One Program forward, and a need to increase the level of productivity. The evaluator praised King's enthusiasm, her oral and written communication skills, and her professional knowledge. See Defs. Ex. E. Subsequent to this evaluation, Plaintiff was informed that she was being assigned to another school as an assistant principal. See Third Am. Compl. ¶ 17.

In her final, end-of-year evaluation for the school year 1994-1995, King received a "Performing at a Professional Level" rating in all but one category, that of Individual and Group Leadership. The evaluator noted that Plaintiff had "worked through the problems cited during the mid-year evaluation." " See Defs. Ex. E.

Given the above summary, it is true that Plaintiff certainly received positive evaluations and accounts of her work. However, by the same token, the evaluations also indicate at least some problems and criticisms. Several categories, such as Planning and Organizing, Analysis, Decision Making/Judgment and Individual and Group Leadership appear in the Needs Improvement ratings for Plaintiff for several years. There is no dispute by the parties that these categories are not important for someone assuming the principalship of a school. Furthermore, as the Court has noted, Defendants' burden at this stage is production, not persuasion. See Standard, 161 F.3d at 1331. The Court finds that based on this record, Defendants have proffered legitimate, non-discriminatory reasons for Plaintiffs demotion.

Accordingly, the burden now falls on Plaintiff to show illegal discrimination occurred. See Wright v. Southland Corp., 187 F.3d 1287, 1291-92 (11 'h Cir. 1999) (stating that if the employer/defendant carries its burden of production, the presumption of illegal discrimination drops from the case). In other words, Plaintiff must show that more probably than not the proffered reasons are merely a pretext for discrimination. See Standard, 161 F.3d at 1331-32 (stating that the heart of the pretext inquiry is not whether the employee agrees with the employer's proffered reasons for the discharge but whether the employer really was motivated by those reasons). Plaintiff may do this either directly by showing that a discriminatory reason more likely motivated Defendant or indirectly by showing that Defendant's proffered explanation is unworthy of credence. See Mayfield, 101 F.3d at 1376 (citations omitted). As stated by the Eleventh Circuit, "[p]rovided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. A1 Transport, 229 F.3d 1012, 1030 (11'" Cir. 2000). Plaintiff must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered legitimate reasons that a reasonable fact finder could find [all the reasons] unworthy of credence." Land d, 161 F.3d at 1333.

Plaintiff asserts several grounds in support of her argument that Defendants' proffered reasons are pretextual. First, Plaintiff contends that she is not to blame for some of the problems that were recorded on her evaluation sheets. For instance, Plaintiff states that in one of her first years as principal, she overspent the budget because she had been incorrectly told to spend the money by Lorette David. See Pl.'s Dep. at 34. She also asserts that she was not responsible for the problems noted by David concerning Plaintiff s alleged failure to monitor the adult literacy teacher program. Id. at 66. Plaintiff asserts that she, in fact, was not in charge of that program. Id. at 68.

On the other hand, Plaintiff acknowledges that in her role as school principal, she possessed the ultimate responsibility for administrative problems that arose, and for developing, orientating and maintaining a competent staff. See Pl.'s Dep. at 42. Furthermore, she concedes that there were ongoing problems with Markham Elementary School's budget and with the hiring of various instructional and non-instructional personnel, such as a bookkeeper. See Pl.'s Dep. at 35-37, 50, 63, 65, 76. Nor does it appear from the record that these problems, particularly the budget problems, were of short duration. Plaintiff even states that it is "unusual" to receive less than a "Performing at a Professional Level" evaluation. See Pl.'s Dep. at 32. She also acknowledges that she wishes she had had more time to put into the management aspect of the school and that some assistance would have been helpful. See id. at 168.

In sum, while Plaintiff does offer reasons for some of the criticisms on her evaluations, she does not rebut Defendants' assertion that at least some of the problems occurred. Nor does she negate her own responsibility in handling the various problems that arose. Furthermore, Plaintiff's assertions of her own excellent performance are insufficient to show pretext in the face of documented deficiencies. "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts or for no reason at all, as long as its action is not for a discriminatory reason." Nix, 738 F.2d at 1187. The fact that Plaintiff claims her performance was adequate and that she believes that she was not responsible for at least some of the alleged deficiencies is irrelevant as to whether Defendants held those beliefs. See Gustovich v. AT&T Communications. Inc., 972 F.2d 845, 848 (7`" Cir. 1992).

In further support of her argument that the evaluations are pretext for unlawful discrimination, Plaintiff also asserts that a number of administrative officials, including her evaluators, Lorette David and Francis Haithcock, discriminated against her. Plaintiff states that David just "looked for stuff to write up," tried to find out things about her, and told Plaintiff that she wasn't a good principal. See Pl.'s Dep. at 59, 64, 90, 163. She contends that David made comments about Plaintiff's staff that Plaintiff felt were racially derogatory, although she is unable to remember the exact wording of these alleged comments. See Pl.'s Dep. at 56. Plaintiff also asserts that Haithcock, while initially "encouraging and supportive," subsequently seemed less so. See Pl.'s Dep. at 107. Regarding alleged racial discrimination by Haithcock, Plaintiff states that Haithcock prevented her from attending a conference. See id. at 108. However, Plaintiff also concedes that she does not know whether Haithcock was racially motivated but that it was "a possibility." 1d. at 61.

Even if true, these allegations do not speak to racial bias on the part of Defendants, but amount to conjecture and speculation. It is well-settled that a plaintiffs mere belief, conjecture or speculation that she was discriminated against is insufficient to support an inference of discrimination or to satisfy the plaintiff's burden in responding to a properly supported summary judgment motion. Elrod v. Sears. Roebuck and Co., 939 F.2d 1466, 1471 (11" Cir. 1991) (stating that conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where an employer has offered extensive evidence of legitimate, non-discriminatory reasons for its actions); Grigsby v. Reynolds Metals Co., 821 F.2d 590, 597 (11" Cir. 1987); see also Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985) (stating that the ultimate inquiry is whether an employee's performance meets his/her employer's legitimate expectations and mere allegations that the employee was subjected to racial discrimination is insufficient to show pretext).

Additionally, Plaintiff appears to try to assert a pattern of discrimination by Defendants. Plaintiff proffers the deposition testimony of Lisa Maxwell, the Executive Director of the Broward Principals' and Assistant Principals' Association. Maxwell asserts in her deposition that there were "in excess of eleven African American individuals during [Defendant Petruzielo's tenure as Superintendent]" who "apparently were threatened with demotion or termination or some other form of punishment," while only two white individuals received the same treatment during the same time period. Maxwell Dep. at 62. Maxwell provides no statistics or definite numbers concerning the alleged demotions, however. Nor does she describe the individuals' particular conduct.

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In addition to Maxwell's testimony, Plaintiff identifies three African American women who were allegedly discriminated against by Defendants. Two of these women were principals who were demoted to assistant principals. The third female was demoted from middle school principal to elementary school principal. See Pl.'s Dep. at 256-57; *see also* Pl.'s Ex. F.

The Court finds that this proffered evidence is presented in a vacuum, as it were. Plaintiff concedes that she doesn't know of the particular problems or circumstances that sparked the demotions of the there individual female employees. *See* Pl.'s Dep. at 260-61. She also states that she "doesn't know" or "cannot think" of any white females who had been demoted. Id. at 257. Pure conjecture and unsubstantiated allegations do not suffice to present an issue of material fact surviving summary judgment. Furthermore, even if Plaintiff s allegations about the number of black females demoted are true, they are of no probative value whatsoever without the proper statistical foundation, which Plaintiff entirely fails to present. Plaintiff does not provide any comparative numbers that indicate the success rates of similarly qualified black and white principals employed by Defendants. See *Allen v. City of Athens*, 937 F.Supp. 1531,1546 (N.D. Ala. 1996). In this case, Plaintiff has failed to demonstrate how or why the non-discriminatory reasons given by Defendants are pretextual.

Accordingly, given that Defendant has proffered legitimate, non-discriminatory reasons for discharging Plaintiff, and given that Plaintiff has failed to produce evidence from which a reasonable fact finder could conclude that these reasons are mere pretext, Plaintiff's claims of discriminatory demotion on the basis of race should be dismissed.

B. Discriminatory Failure to Promote

Plaintiff also alleges that Defendants failed to promote or reinstate her to the principal position on the basis of her race. As with Plaintiff s claims of unfair demotion, the Court applies the three-step analysis setting forth the basic allocation of burdens and order of proof developed in McDonnell Douglas. Under this framework, Plaintiff has the burden of establishing a prima facie case of discrimination and of rebutting any legitimate, non-discriminatory explanation produced by Defendants.

Plaintiff may establish a prima facie case by showing: 1) that she is a member of a protected class; 2) she sought and was qualified for positions that Defendants were trying to fill; 3) despite her qualifications, she was rejected, and; 4) after her rejection, Defendants either filled the positions or continued to attempt to fill the positions. See Alexander v. Fulton Co., 207 F.3d 1303, 1339 (11 ˋ" Cir. 2000); Crawford v. Western Elec. Co., 614 F.2d 1300, 1315 (5ˋ" Cir. 1980) (citation omitted). The record before this Court demonstrates that Plaintiff satisfies this prima facie test.

Accordingly, Defendants must produce legitimate, non-discriminatory reasons for their failure to promote Plaintiff to the principal position. Here, Defendants point to the mixed evaluations received by Plaintiff, and which are summarized in detail above. See supra pp. 11-14. Furthermore, Defendants assert that they engaged in a fair process by which applicants may seek a principalship. For the purposes of the underlying Motion for Summary

Judgment, it is necessary to explain this process in brief detail.

Defendants assert that applicants for principal positions were placed on an eligibility list. A Vacancy Screening Committee generally composed of an area director, a superintendent's designee and a representative from the Division of District Administration reviewed the resumes and background information.[2] Various candidates were then recommended to the Interview Committee for the specific school seeking to fill the vacancy. This Interview Committee generally included an Area Superintendent, School Board employees, and administrative personnel. A list of three finalists was then submitted to the Superintendent, who would then make a final recommendation to the School Board. The School Board could reject the recommended employee for good cause. See Third Am. Compl., Ex. G, School Board Policy 4002.14; see also Defs. Statement of Undisputed Material Facts 1 39; Pl.'s Dep. at 249-50. Plaintiff herself acknowledges that this process per se, in which an applicant submitted his or her application, was selected for an interview, went before the interview panel and then was recommended to the Superintendent who would select a candidate for the School Board for final approval, was fair. See Pl.'s Dep. at 250-51. However, she does allege that Defendant Petruzielo "controlled" the application process, thereby "subverting" it. See Pl.'s Objections to Defs.' Undisputed Facts ¶39. There is no indication from the record that Plaintiff was prohibited from participating in this process. Plaintiff testifies that after her demotion to assistant principal, she applied to more than a dozen schools for the principal position. See Pl.'s Dep. at 181

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[2] Defendant Petruzielo states that generally applications were first screened by the personnel department. Interviews were held following this screening. Typically, interviews for principal positions involved an area director, perhaps an area superintendent and sometimes other principals. Subsequently, the names of three applicants would be recommended to Superintendent Petruzielo, who would then interview those three candidates. He then would select one of the candidates for recommendation to the School Board. See Petruzielo Dep. at 9.

She received two or three interviews before the area directors. See id. at 182. One of these interviews was actually for three schools. Id. at 183. However, she did not receive a principal position. Defendants assert that Plaintiffs failure to be promoted was nothing less than the result of a fair process in which all the applicants participated. With regard to the particular positions for which Plaintiff applied and was rejected, Defendants further assert that qualified applicants were selected for those positions.

The Court finds that Defendants have produced legitimate, non-discriminatory reasons for their alleged failure to promote Plaintiff. Therefore, it is Plaintiff's burden to rebut Defendant's proffered reasons and demonstrate that there is a genuine issue as to whether those reasons are pretextual. See Alexander, 207 F.3d at 1341 (stating that it is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated). Thus, for purposes of the instant Motion for Summary Judgment, Plaintiff must establish a genuine issue of material fact as to whether Defendants' proffered reasons are unworthy of belief.

Plaintiff first asserts that the fact that she completed the Principal Internship Program was omitted from the information provided to the Interview Committee, thus severely weakening her chances of receiving a promotion. See Pl.'s Dep. at 183. The Court does not find, however, that this allegation, standing alone, is sufficient so as to deny summary judgment. Plaintiff does not dispute the fact that she did receive the opportunity to interview on several occasions. Additionally, while Plaintiff asserts that she believes she was more qualified than some of the successful candidates, Plaintiff does not actually dispute that the applicants who did receive the promotions were qualified. Rather, she admits that she lacks knowledge about the qualifications of at least several of the successful principal candidates. See Pl.'s Dep. at 241-42.

Plaintiff hinges most of her argument that she was unfairly denied promotion on conclusory allegations that various school officials and members of the Interview Committee were racially biased against her. See Pl.'s Dep. at 182, 185. When asked at deposition for the basis of this belief, Plaintiff grounds her assertion on the fact that she had "heard" that Defendant Petruzielo and his supporters would not let her back into the principal position. Id. at 190. She further asserts that one member of the Interview Committee did not respond to her requests for a meeting. See id. at 195.

The Court finds that these allegations are lacking in factual basis and amount to little more than unsubstantiated speculation and conjecture. As with Plaintiff's claims of discriminatory demotion, merely conclusory allegations of discrimination are insufficient to raise the inference of pretext. In essence, Plaintiffs argument is circular. She argues that she was not promoted, therefore, she was the target of unlawful discrimination. However, the conclusory allegations made by Plaintiff do not speak to the issue of whether Defendants' proffered reasons are false or unworthy of credence. In short, Plaintiff has failed to rebut Defendants' legitimate, non- discriminatory reasons for the alleged failure to promote.

II. Plaintiffs Claims of Due Process Violations

Plaintiff asserts that her federal, constitutional rights to due process were violated because she was demoted to an assistant principal position without adequate notice or a hearing. See Third Am. Compl. 11 67, 68. In support of this argument, Plaintiff asserts that under the amended School Board Policy 4009.1, adopted and followed by Defendant School Board on January 17, 1995, final performance evaluations were to be completed for administrative and supervisory employees who would not be recommended for reappointment by March 24, 1995, so that said employees would have sufficient notice to appear at the April 11, 1995 Board meeting. See Third Am. Compl., Ex. A; see also Defs. Reply, Ex. A. Plaintiff states that she did not receive her Final Evaluation in March. The record indicates that Plaintiff received a mid-year evaluation on January 31, 1995, and a final, end-of-year evaluation on June 29, 1995, for the school year 1994-1995. See Defs. Ex. E.

Defendants counter in part that Plaintiff does not have a claim to a due process violation under federal, constitutional law, because she does not have a valid property interest or right. This

Circuit has held that under the United States Constitution, a plaintiff is not entitled to procedural due process unless he or she has a legitimate expectation of continued employment which rises to the level of a property right. Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1148 (11" Cir. 1994) (citations omitted). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Therefore, due process concerns are implicated only when an employee has a property interest in continued employment.

Defendants argue that Plaintiff does not have a legitimate claim of entitlement to continued employment because she was an employee under an annual contract. Defendants further argue that Plaintiff was not discharged from her employment as a principal prior to the expiration of the contract. As a threshold matter, Plaintiff asserts in her Response to Defendants' Motion for Summary Judgment that she never received any document "purporting to be a contract during the relevant period." See Pl.'s Resp. at 11. In her Deposition, however, Plaintiff states that she had been informed by her employer that she was on annual contract. See Pl.'s Dep. at 21. She also acknowledges that she received letters in the spring of each year that she worked as a principal in the Broward County school system. Said letters informed Plaintiff of her job assignment for the following school year. Id. Plaintiff adds that as a principal she was generally on a 12-month calendar. Id. at 23. Plaintiff also states that she "never really worried" about the fact that she was on an annual contract. Id. at 21.

The primary difference between an annual contract and a continuing contract is that annual contracts are simply permitted to expire at the end of the school year, and those subject to such a contract generally have no right to re-employment. See e. ., Brew v. School Board of Orange County, 626 F.Supp. 709, 713 (M.D. Fla. 1985) (finding that teacher's aide was not deprived of a constitutionally protected property interest when she was employed, paid and received all benefits through the expiration of her contract), aff'd, 802 F.2d 1397 (11 " Cir. 1986); MacPherson v. School Board of Monroe County, 505 So. 2d 682, 683 n. 1 (Fla. 3d DCA 1987); see also Fertally v. Miami Dade Community College, 651 So.2d 1283, 1284 (Fla. 3d DCA 1995) (holding that community college associate professor had no expectancy of continued employment when she was discharged after the expiration of her annual contract); Cornwell v. University of Florida, 307 So.2d 203 (Fla. Ist DCA 1975) (holding that non-tenured professor who had been employed on successive annual contracts had no reasonable expectation of re-employment). Plaintiffs annual contract ran on its own terms and it is well within the discretion of the School Board to withhold any future annual appointments. Following expiration of said annual contract, the contingent possibility that Plaintiff would receive a new contract was a mere "unilateral expectation, unprotected by the Constitution." Nelson v. School Board of Palm Beach County, 738 F.Supp. 478, 480 (S.D. Fla. 1990). An employee's mere subjective expectation of continued employment does not give her a constitutionally protected property interest. Perry v. Sindermann!s20 , 408 US 593, 603 (1972). At best, Plaintiffs Third Amended Complaint asserts a procedural due process claim predicated upon the fact that she was not retained as a principal for the school year of 1995-1996. Inasmuch as Plaintiff can claim no property interest or right in such an appointment, or otherwise in continued employment with the School Board, no procedural due process violations can follow. See Cox v. McCraley, 993 F.Supp.1452, 1456 (M.D. Fla. 1998).

Plaintiff also does not have a liberty interest in her position. To implicate a liberty interest, Plaintiff must allege that the change in employment was "attended by stigmatizing charges which `might seriously damage her standing and associations in her community,' or foreclose her freedom to take advantage of other employment opportunities." Nelson, 738 F.Supp. at 480. There is no indication from the record before this Court that Plaintiff's demotion was accompanied by such a stigmatizing charge or that Plaintiff was prevented from taking advantage of other employment opportunities.

Alternatively, Plaintiff argues that a property interest arose in her continued employment because Defendant Petruzielo allegedly promised her that if she received a good evaluation at the close of the 1995-1996 school year, he would ensure that she received a principal position. See Pl.'s Dep. at 149. While Defendant Petruzielo disputes that he made such a promise to Plaintiff, whether or not such a promise **was made** is not dispositive of this particular issue.

The Eleventh Circuit has held that an expectation of continued employment may arise if the circumstances of the employment created a "mutually explicit understanding." Schneider v. Indian River Community College Found.. Inc., 875 F.2d 1537, 1545 (11'" Cir. 1989); see also Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1186 (11`" Cir. 1985). Here, Plaintiff argues that the promise allegedly made to her by Defendant Petruzielo created a mutually explicit understanding such that she had an expectation of continued employment as a principal, after she already had been demoted to the position of assistant principal. See Pl.'s Resp. at 11. Therefore, following Plaintiff's line of reasoning, Plaintiff was denied due process when she did not receive notice in

March. However, this argument is flawed. The promise by Defendant Petruzielo allegedly was made in September or October of 1995, several months after the April hearing before the Board, and after Plaintiff had already been demoted. Furthermore, to the extent that Plaintiff might argue that she purposely did not seek a subsequent hearing before the School Board after Defendant Petruzielo's alleged promise, and thus was denied due process, this decision, Plaintiff herself acknowledges, was voluntary.'

Accordingly, Plaintiff's claims of due process violations should be dismissed.

III. Plaintiff's Contractual Claims

Plaintiff asserts that Defendant Petruzielo's statement to her that she would be considered for a position as principal rose to the level of a verbal contract, which was tortiously breached when Plaintiff was not restored as principal. See Third Am. Compl. 1 89. Alternatively, Plaintiff asserts that she relied to her detriment upon Defendant Petruzielo's promise. See id. ¶ 91.

Assuming that Defendant did make such a promise to Plaintiff, said promise had no definite term of duration. Under Florida law, oral contracts for employment that are not for a specific term are terminable at will. a e. ., Dewachter v. Scott, 657 So.2d 962 (Fla. 4" DCA 1995) (barring claim because it attempted to circumvent the bar to a breach of contract action based on a oral lifetime contract that was terminable at will); see also McConnell v. Eastern Air Lines Inc., 499 So.2d 68, 69 (Fla. 3d DCA 1986) (holding that a complaint failed to state a cause of action for breach of an oral employment contract because the subject employment contract had no definite term of duration and thus was terminable at the will of either party); Maguire v. American Family Life Assurance Co., 442 So.2d 321, 322 (Fla. 3d DCA 1983) (holding that without an employment contract specifically obligating both the employer and the employee for a definite period of employment, the employment is considered to be indefinite and terminable at the will of either party.

Second, even if Defendant Petruzielo entered into such an oral contract or promise, which he disputes, he would have to have done so in his official capacity as Superintendent of the School Board of Broward County. This Court has dismissed all claims against Defendant Petruzielo in his official capacity.

Accordingly, Plaintiff's claims of tortious breach of contract and detrimental reliance should be dismissed.

IV. Plaintiff's First Amendment Claims

Plaintiff asserts that Defendants demoted her to the assistant principal position and reduced her pay in retaliation for comments Plaintiff made concerning a state legislator and School Board employee. See Third Am. Compl. 11 88, 92. Plaintiff further asserts that these actions violated her First Amendment right to free speech. See id.

The Supreme Court has held that a public employee must satisfy four conditions in order to prevail on a claim that she was penalized in return for constitutionally protected speech. First, Plaintiff must demonstrate that the speech allegedly resulting in her demotion may be "fairly characterized as constituting speech on a matter of public concern." Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11" Cir. 1989) (quoting Connick v.

Mvers, 461 U.S. 138, 146 (1983)). A court examines the content, form and context of the employee's speech to determine if it addresses a matter of public concern. Id. (citation omitted). Second, if the speech at issue does address a matter of public concern, the court then engages in a balancing test, weighing the employee's First Amendment interests against the interests of the employer in promoting the efficiency of the public services it performs through its employees. Id. 1f the employee prevails on the balancing test, the fact-finder determines whether the employee's speech played a substantial part in the employer's decision to demote or discharge the employee. Id. at 566 (quoting Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977). Fourth and finally, if the employee prevails by showing that the speech was a substantial motivating factor in the employer's employment decision, the employer must prove by a preponderance of the evidence that it would reached the same decision even in the absence of the protected conduct. Id.

The threshold question of whether speech "relates to matters of public concern is a question of law and "is therefore readily susceptible to disposition on summary judgment." Ferrara v. Mills, 781 F.2d 1508, 1515 (11 '1 Cir. 1986). If the employee's speech cannot fairly be characterized as constituting speech on a matter of public concern, the inquiry is at an end. 1d. at 1512. Speech addresses a matter of public concern when the speech can fairly be "considered as relating to any matter of political, social, or other concern to the community." Connick, 461 U.S. at 146. In order to determine whether Plaintiffs speech addressed a matter of public concern, and given that "a public employee's speech will rarely be entirely private or entirely public," this Court must review the context, form and content of Plaintiff's speech, so that its main thrust can be determined. Maio v. Vile, 211 F.3d 1346, 1351 (11" Cir. 2000). This Court must discern whether Plaintiff spoke mainly as a citizen on behalf of the public or as an employee upon matters of personal interest. Id.

Plaintiff asserts that the public figure in question had an extramarital relationship with Plaintiffs daughter. See Pl.'s Resp. at 13. The couple conceived a child. Id. Plaintiff states that she discussed the relationship with her "family and close friends" See Pl.'s Dep. at 205. Sometime in 1992, Plaintiff commented on the affair to the public figure's wife. She states that she personally knew the wife, and that the wife asked her to tell her the truth about the relationship during a private conversation at lunch. See Pl.'s Dep. at 197, 206. Sometime in 1995, Plaintiff also spoke to Defendant Petruzielo regarding what she terms as the public figure's "issues of moral turpitude and how they were injurious to her and others." Pl.'s Resp. at 12-13. Plaintiff states that despite receiving this information, Defendant Petruzielo failed to promote her. Id. at 14. Plaintiff also asserts that Defendant Petruzielo appointed the public official to the Diversity Committee. Id. Plaintiff further accuses said official of being involved in her demotion and in Defendants' failure to promote her, as retaliation for her disclosure of the affair. See Pl.'s Resp. at 15; Pl.'s Dep. at 201. She goes on to allege that Defendant Petruzielo and the public official "formed some kind of alliance ... and decided that I would not be given the ability to be principal." Pl.'s Dep. at 253.

Despite Plaintiff's assertion now that she spoke about the affair as a matter of public concern, the record demonstrates that Plaintiff's primary concern touched on her own job and personal affairs. While Plaintiff's comments did concern a public figure, the record discloses that these comments were primarily and overwhelmingly personal in nature. See Pearson v. Macon-Bibb County Hospital Auth., 952 F.2d 1274,1278 (11 1 Cir. 1992) (finding that a free speech claim was foreclosed because appellant's remarks primarily concerned the circumstances of her own employment and only incidentally touched on conditions for patients); Chernov v. City of Hollywood, 819 F.Supp. 1070, 1073 (S.D. Fla. 1993) (finding that plaintiffs speech did not address a matter of public concern because the plaintiff s concerns admittedly focused on his own salary and job responsibilities), aff'd, 19 F.3d 1446 (11th Cir. 1994). The Supreme Court explicitly stated in Connick, 461 U.S. at 147, that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

The record before this Court demonstrates that Plaintiff's speech did not address a matter of public concern within the meaning of Connick, and thus, Plaintiffs First Amendment claims should be dismissed.

RECOMMENDATION

Based upon the foregoing, it is

RESPECTFULLY RECOMMENDED that Defendants' Motion for Summary Judgment [DE#126] be GRANTED in its entirety.

The parties have ten (10) days from the date of this Report and Recommendation to file written objections, if any, with the Honorable Shelby Highsmith. See 28 U.S.C. § 636 (1991). Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745, 750 (11t' Cir.), cert. denied, 488 U.S. 958 (1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 16" day of February, 2001.

/s/
BARRY L. GARBER
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to:
U.S. District Judge Highsmith
Counsel of record

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Supreme Court, U.S.
FILED
FEB 18 2003
CLERK

No. 02-1073

In the

Supreme Court of the United States

WILHELMINA G. KING,

Petitioner,

v.

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,
and FRANK R. PETRUZIELO, Superintendent,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[Rephrased]

I. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS (AND THE DISTRICT COURT) ERRED IN CONCLUDING THAT THE ANNUAL LETTERS TO THE PLAINTIFF, WHICH WERE PERFORMED BY BOTH PARTIES, CONSTITUTED CONTRACTS UNDER FLORIDA LAW.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ENTER A DEFAULT JUDGMENT AGAINST THE SCHOOL BOARD (AND, THUS, WHETHER THE ELEVENTH CIRCUIT ERRED IN FINDING THAT THE DISTRICT COURT'S ENTRY OF A LESSER SANCTION WAS WITHIN ITS DISCRETION) WHEN THE SCHOOL BOARD ULTIMATELY RESPONDED TO THE DISCOVERY REQUESTS.

III. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT IN ITS *DE NOVO* REVIEW) APPLIED THE IMPROPER STANDARD ON SUMMARY JUDGMENT.

IV. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT) IMPROPERLY CONCLUDED THAT THERE WAS NO EVIDENCE OF SPOLIATION OF EVIDENCE.

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CITATIONS

None of the lower court decisions are officially reported. The United States District Court for the Southern District of Florida entered the following orders which are attached in the Petitioner's Appendix:

Appendix 5: February 16, 2001 Report and Recommendation of Magistrate Judge Garber
Appendix 3: July 19, 2001 Summary Final Judgment
Appendix 4: September 12, 2001 Order Denying Plaintiff's Motion for Reconsideration

The order entered by the Eleventh Circuit Court of Appeals is also attached in the Petitioner's Appendix:

Appendix 1: July 7, 2002 Order Affirming Final Summary Judgment
Appendix 2: October 11, 2002 Order Denying Motion for Rehearing En Banc

BASIS FOR JURISDICTION

The district court's (United States District Court for the Southern District of Florida's) subject matter jurisdiction was pursuant to 28 U.S.C. §1343, 42 U.S.C. §2000e, et seq., and various constitutional provisions asserted by the Plaintiff/Petitioner, King.

The Eleventh Circuit's jurisdiction falls under 28 U.S.C. §1291, as the subject order was a final order granting Final Summary Judgment in favor of the Defendants/Appellees, now Respondents, the School Board of Broward County and its former Superintendent, Frank R. Petruzielo, on all remaining counts against them.

This Court's discretionary jurisdiction is sought pursuant to Supreme Court Rule 10.

CONSTITUTION/STATUTORY AUTHORITIES

Those potentially applicable constitutional provisions and statutory authorities have been set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

After the dismissal of several complaints and causes of action (1R 15, 19, 36; 2R 37, 38, 44, 48, 51), this case proceeded on the following counts set forth in the Third Amended Complaint:

Counts I, II, III and X:	Racial Discrimination
Counts II and VII:	Violation of Due Process Rights
Counts IV and VII:	Violation of First Amendment
Counts V and VI:	Contractual Issues (Pendent State Claims)

(RE 39; 2R 39). During the pre-trial proceedings, both parties filed motions seeking to further the discovery process, including motions to compel the production of records and/or responses to interrogatories, motions to compel appearance at depositions, and motions seeking the issuance of protective orders (2R 47, 68, 70, 75, 77; 3R 93, 94, 95, 100; 4R 104). After each of the three discovery hearings (6R; 7R; 8R), the magistrate judge granted some motions and denied others (RE; 3R 85, 86, 92, 119).

After the conclusion of written discovery and the pertinent depositions, the School Board and Superintendent Petruzielo filed their statement of undisputed facts and a joint motion for summary judgment as to all remaining counts against them (4R 126, 127, 134). The Plaintiff filed a response (4R 131, 132), and the School Board and Superintendent Petruzielo filed a brief reply (4R 134). The magistrate judge entered a thirty-one page report and recommendation which made detailed findings of fact and ultimately recommended that the district court grant the motion for summary judgment, in its entirety (RE; 4R 137; App. 5). After giving the Plaintiff appropriate time to file objections (4R 142), the district court adopted the report and recommendation, in toto, and entered final summary judgment (RE; 4R 144; App. 3). The Plaintiff's motion for reconsideration (4R 145; 5R 150) was denied (RE; 5R 153; App. 4), and an appeal ensued (5R 156). The Eleventh Circuit Court of Appeals affirmed the summary judgment on all counts (App. 1), the Plaintiff's motion for rehearing en banc was denied (App. 2), and the Plaintiff's motion to recall and stay the mandate was denied.

The facts of this case, as set forth in the magistrate judge's report and recommendation (App. 5; 4R 137), verbatim (with appropriate record citations inserted), are as follows: "Plaintiff, Wilhelmina G. King, is an African-American female currently employed as an assistant principal by Defendant, the School Board of Broward County, Florida (hereinafter 'School Board'), at the Silver Ridge Elementary School. See Pl. Dep. at 5 [4R 127, Exh. A, p. 5]. Plaintiff has been employed by the School Board for more than three decades. Id. [4R 127, Exh. A, p. 5]. Prior to her current position, Plaintiff was employed as a principal by the School Board for the years 1988-1994 at the Robert C. Markham Elementary School. Id. at 6 [4R 127, Exh. A, p. 6]. She initially was an acting principal, then was promoted to interim principal and finally to full-time principal. Id. [4R 127, Exh. A, p. 6]. During her first year at Markham Elementary School, Plaintiff completed the Principal Internship Program. Id. at 28-29 [4R 127, Exh. A, pp. 28-29]. During her employment as principal at Markham Elementary School, Plaintiff was told that she was hired on an annual contract basis. Id. at 21 [4R 127, Exh. A, p. 21, Exh. B, D, F, G]. Additionally, Plaintiff received two evaluations during each year that she was a principal: a mid-year review and a final, end-of-year review. Id. at 26; see also Defs. Ex. C [4R 127, Exh. A, p. 26, Exh. C, E]. These evaluations reflected whether the evaluatee was 'Performing at a Professional Level,' or at a 'Needs Improvement in Professional Performance' level [4R 127, Exh. A, p. 26, Exh. C, E]. As further detailed below, Plaintiff received an overall evaluation of 'Needs Improvement' on her 1992-1993 mid-year report [4R 127, Exh. C]. She then received overall evaluations of 'Performing at a Professional Level' for the end-of-year report for 1992-1993 and for the mid-year report of 1993-1994 [4R 127, Exh. C]. Subsequently, Plaintiff received a 'Needs Improvement' overall evaluation for her end-of-year report for 1993-1994. See Defs. Ex. C [4R 127, Exh. C].

By the spring of 1994, Plaintiff states 'that she might have been on the verge of being burned out.' Pl.'s Dep. at 91-92 [4R 127, Exh. A, pp. 91-92]. She decided that she 'want[ed] to take a hiatus away,' and informed the Area Superintendent that she would like to do something different that was still in line with her work as a principal. Id. at 91 [4R 127, Exh. A, p. 91]. Plaintiff was asked if she wished to become involved with the Chapter One Parent Involvement Program, and she voluntarily agreed to be assigned as a principal on task assignment for the 1994-1995 school year. Id. at 93-94 [4R 127, Exh. A, pp. 93-94]. She states that she was 'delighted with the idea.' Id. [4R 127, Exh. A, pp. 93-94]. While with the Chapter One Program, Plaintiff received a mid-year and a final evaluation. See Defs. Ex. E. [4R 127, Exh. E]. In both, she received an overall evaluation of 'Performing at a Professional Level.' [4R 127, Exh. E]. Said evaluations, however, did note a number of areas in which Plaintiff needed improvement. See Pl.'s Dep. at 95-102. [4R 127, Exh. A, pp. 95-102].

In early 1995, Plaintiff discovered that her position with the Chapter One Program would not be available for the subsequent school year, apparently due to downsizing. See Pl.'s Dep. at 93-94 [4R 127, Exh. A, pp. 93-94]. Sometime in May of 1995, Plaintiff was informed that she had been assigned to the position of assistant principal. Id. at 116; see also Defs. Ex. F [4R 127, Exh. A, p. 116, Exh. E]. A letter from the School Board to Plaintiff, dated June 23, 1995, indicates that she was placed as an assistant principal at the Silver Ridge Elementary School for the school year 1995-1996, effective August 1995. See Defs. Ex. G [4R 127].

Plaintiff reported to Silver Ridge Elementary School as an assistant principal in the fall of 1995, for the 1995-1996 school year [4R 127, Exh. A, pp. 143-144]. She also met twice with Defendant Frank Petruzielo, then the Superintendent of the Broward County School Board, in September and October of 1995 to discuss her demotion to assistant principal. See Pl. Dep. at 147-48 [4R 127, Exh. A, pp. 147-148]. Plaintiff asserts that Petruzielo 'assured' her that if she received a positive evaluation at Silver Ridge she would receive a principalship. Id. at 149 [4R 127, Exh. A, p. 149]. Defendant Petruzielo also advised Plaintiff that he would speak to various colleagues and administrators in order to investigate the demotion. Id. [4R 127, Exh. A, p. 149, Exh. H, #9; 4R 135]. In a letter to Defendant Petruzielo, dated April 15, 1996, Plaintiff wrote that she hoped he would consider her request to be placed as a principal. See Defs. Ex. I [4R 127]. Plaintiff also applied for a position as principal at Silver Ridge Elementary School on or about April 15, 1996. See Third Am. Compl. ¶25 [RE; 2R 39, ¶25]. She did not receive the promotion.

After receiving a positive 'Performing at a Professional Level' evaluation for her work as assistant principal during the school year of 1995-1996, Plaintiff was reassigned to Silver Ridge Elementary School as an assistant principal for the following year [4R 127, Exh. A, pp. 159-160]. Her salary, which had been protected at the principal's rate for the 1995-1996 school year, was reduced to that of an assistant principal. See Pl.'s Dep. at 159; Third Am. Compl. ¶35 [2R 39, ¶35; 4R 127, Exh. A, pp. 159-160].

Between 1995 and the present, Plaintiff has applied for at least eleven principal positions. See Pl.'s Dep. at 171, 181; Third Am. Compl. ¶26 [2R 39, ¶26; 4R 127, Exh. A, pp. 171, 181]. Plaintiff asserts that sometime in the summer of 1997, Mark Seigle, the Associate Superintendent for Personnel, telephoned her and advised her that he had spoken with Defendant Petruzielo and that Defendant Petruzielo had asked him to contact her to tell her that she should apply for open principal positions. See Pl.'s Dep. at 173 [4R 127, Exh. A, p. 173]. Plaintiff apparently received two or three interviews before area directors and their designees in response to her applications for a principal position. Id. at 181 [4R 127, Exh. A, p. 181]. To date, Plaintiff has not been selected for a principal position.

Plaintiff subsequently filed a complaint with the Equal Employment Opportunity Commission ('EEOC'), alleging that she had been demoted without notification, and that she had applied for various principalships since 1995, but had not been selected because of her race. See Pl.'s Dep. at 169 [4R 127, Exh. A, pp. 168-169]. She asserts that her unsuccessful application for a principalship at Plantation Elementary School prompted the filing of the complaint. See id. at 172-173 [4R 127, Exh. A, pp. 172-173]. In November, 1998, Plaintiff received her Right to Sue notice from the EEOC. See Third Am. Compl. ¶45 [2R 39, ¶45].

[(Paraphrased) After receiving the Right to Sue letter, the Plaintiff filed this action against the School Board and Superintendent Petruzielo. After several complaints were dismissed (1R 6, 7, 15, 17, 18, 19, 22, 23, 24, 25, 28, 30, 35; 2R 37, 39), the Plaintiff's Third Amended Complaint was filed (2R 39). The Court dismissed three counts and the case proceeded on the following actions (2R 43, 48).]

"In Counts I, II, III and X, the Plaintiff asserted that the Defendants, the School Board and

Superintendent Petruzielo, violated her constitutional rights under 42 U.S.C. §1981, 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., in demoting her from a principal position and in failing to reinstate her to principalship status (RE; 1R 39; 4R 137, p. 5).

In Counts II and VII, the Plaintiff asserted that the Defendants violated her Fourteenth Amendment right to due process and her rights under 42 U.S.C. §1981 and 42 U.S.C. §1983 through their alleged failure to reinstate her to the position of principal (RE; 1R 39; 4R 137, p. 5).

In Counts IV and VII, the Plaintiff asserted First Amendment violations by the Defendants, in the reduction of her pay and status to that of an assistant principal (RE; 1R 39; 4R 137, p. 5).

In Count V, the Plaintiff asserted that Defendant Petruzielo tortiously breached a verbal contract in failing to restore her to a principal position.

In Count VI (denoted as Count IV in the Third Amended Complaint), the Plaintiff asserted that she detrimentally relied on a statement by Defendant Petruzielo, and suffered damages as a result (RE; 1R 39; 4R 137, p. 5)." [*End of verbatim recitation of report and recommendation* (App. 5; 4R 137.)]

Because the Plaintiff's Petition for Writ of Certiorari primarily focuses on the discovery proceedings in this case, an overview of those proceedings, from the commencement of the case, should provide this Court with a better understanding of the magistrate judge's rulings.

The Plaintiff filed her very *first* motion to compel shortly after counsel for the School Board and Superintendent Petruzielo had been substituted (2R 29, 32, 47). That very first motion sought a default and/or other sanctions under Fed. R. Civ. P. 37 (despite the fact that the responsive pleadings had not even been filed) (2R 47, 53, 54). That motion was never received by the newly substituted (undersigned) counsel and as such, no response was filed[1] (2R 47). Having not received a response from the School Board, the magistrate judge entered an order granting in part and denying in part the motion to compel (compelling the School Board to respond to the discovery) and granting in part and denying in part the motion for sanctions (awarding the Plaintiff fees and costs for bringing the motion to compel) (2R 57).

Immediately upon receipt of that order, the School Board filed a motion opposing the award of attorneys' fees, suggesting that it had previously, and substantively, responded to the Plaintiff's discovery requests (2R 61). Although some of the discovery responses had been late, the School Board argued that, absent any willful or intentional failure to comply with discovery or any contumacious conduct, the district court should have denied any sanctions (2R 61).

The magistrate judge then scheduled the first discovery hearing (6R). Following that hearing, at which the magistrate judge had the benefit of argument by both counsel, a new order was entered which ordered the School Board to respond to all outstanding discovery, vacated the prior order (awarding sanctions), and ordered the School Board to reimburse the Plaintiff for all costs incidental to Plaintiff's counsel's travel to attend the hearing in Miami (RE; 2R 69). The Plaintiff's trial and appellate counsel, who is also her daughter, appeared *pro hac vice* from Dallas, Texas. The trial court did not award fees to Plaintiff's counsel, or other sanctions, based on a finding that both parties acknowledged that the discovery problems resulted from a lack of communication (6R, p. 10).

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[1] The "certificate of service" on the motion states that it was "delivered to Defendants" but does not provide a name or address for counsel to whom the motion was forwarded. Undersigned counsel never received the motion nor the Plaintiff's notice to the court that her motion had not been ruled upon.

The Plaintiff's discovery requested, among other things, the entire personnel files of all of the Plaintiff's supervisors and the personnel files of each principal appointed to a position for which the Plaintiff had applied (43R 143, Exh. A). Because of a delay in obtaining the personnel files, and in *creating documents which did not otherwise exist*, the School Board's counsel contacted Plaintiff's counsel, before the expiration of the discovery deadline imposed by the court, and notified her that an extension was needed. (2R 77, pp. 2-3; 4R 120, Exh. 1). Plaintiff's counsel agreed to the extension (7R, p. 3), and counsel for the School Board deemed it unnecessary to file a motion seeking an extension of time in which to respond (2R 77, p. 3). Notwithstanding that agreement, the Plaintiff filed a second motion to compel discovery, again seeking the entry of sanctions (2R 75).

The School Board promptly responded (2R 77), advising the Court of the communications between counsel and, further, that the School Board was still in the process of copying and redacting some of those personnel files (to protect social security information, retirement account information, beneficiary information, and the like), but informed that court that it had otherwise complied with all of the Plaintiff's discovery requests (2R 77, p. 5). In an abundance of caution, the School Board simultaneously filed a motion for an extension of time in which to produce those personnel files (2R 80). Again, the School Board suggested that the Plaintiff's request for the entry of judgment by default was an extraordinarily harsh sanction that was not justified under the circumstances, since its conduct had not been intentional, nor had it been designed to delay the litigation of the case (2R 77, pp. 3, 5).

Following a second hearing on these discovery issues (7R), the magistrate judge entered an order compelling the parties to "meet and confer" regarding outstanding discovery disputes, allowed the School Board ten (10) additional days in which to provide the responses that had been uncontrollably delayed, and ordered the School Board to pay the Plaintiff's counsel's costs for attending the hearing in Miami (3R 86; 7R, p. 3). The court deferred ruling on an award of attorney's fees or other sanctions (7R, p. 11).

Subsequently, the School Board notified the court of its compliance, i.e., that it had served its "final" responses to the Plaintiff's discovery requests (3R 87). Simultaneously therewith, the School Board sought (3R 88), and the court granted (3R 92), one additional week in which to produce redacted copies of certain personnel files that had not yet been copied due to their voluminous nature. (In total, the School Board produced approximately twenty (20) personnel files, including some particularly voluminous files of employees that had been with the School Board for decades (2R 77)).

The Plaintiff then filed a "notice of noncompliance" suggesting that the School Board had not provided "complete" responses to her discovery requests (3R 93). Once again, the School Board responded, arguing that it had "fully" complied with the discovery requests, while particularly mindful that it remained subject to an award of sanctions (3R 100; 7R p. 11). The School Board's response went through each discovery request, and corresponding response, and reluctantly sought the court's assistance with what it deemed a difference of opinion as to the sufficiency of the discovery responses (3R 100, p. 2). The School Board also sought a hearing or status conference on this and other outstanding discovery matters, including the School Board's motion to compel better answers to its discovery and the Plaintiff's refusal to appear for a deposition despite a looming discovery cut-off (3R 94, 95 96, 99).

At a third, and final, discovery hearing (8R), counsel for the Defendants sought the court's intervention regarding discovery (8R, pp. 4, 6). The magistrate judge compelled the Plaintiff to provide better answers to discovery and ordered the Plaintiff to appear for her deposition (then scheduled for the sixth time) (4R 119; 8R, pp. 22-23). The court then ordered the School Board to produce documents "to the extent that they had not already been produced" (4R 119; 8R, pp. 24-26). No sanctions were awarded to either party. Several days later, the School Board notified the court that it had complied with the order by producing documents that *had been previously produced* (with the exception of certain School Board minutes that, due to a ministerial error, had previously been produced with copies of only one side of the two-sided pages) (4R 120; 8R, pp. 19, 23-24).

No further discovery motions were filed with the court, no sanctions were awarded, and the parties proceeded with the pertinent depositions. After taking those depositions, and in accordance with the time frame set forth by the court (4R 123), the School Board and Superintendent Petruzielo filed their joint statement of undisputed material facts and joint motion for summary judgment as to all remaining claims (4R 126, 127). Following the Plaintiff's response (4R 131) and the School Board and Superintendent Petruzielo's reply (4R 134), the magistrate judge entered a thirty-one page report and recommendation which recommended that the court grant the motion for summary judgment (App. 5; 4R 137).

After the Plaintiff filed her objections to the magistrate judge's report and recommendation (4R 142) and the School Board and Dr. Petruzielo were provided with an opportunity to briefly reply (4R 143), the district court entered final summary judgment in favor of the School Board and Superintendent Petruzielo adopting, in its entirety, the report and recommendations (App. 3; 4R 144). After the Plaintiff's motion for reconsideration (4R 145) was responded to by the School Board and Superintendent Petruzielo (4R 150), it was denied by the court (App. 4; 5R 153). The School Board and Superintendent Petruzielo's motions for attorneys' fees and costs (5R 146 -149) were denied without prejudice to being re-submitted after the appeal process concluded (5R 157). On appeal, The Eleventh Circuit affirmed the district court's decision holding: (1) a spoliation instruction was not warranted, (2) Plaintiff's discrimination claims were properly dismissed on summary judgment; (3) the district court did not err in refusing to grant the extreme measure of default judgment; (4) there was no evidence of spoliation; and (5) Plaintiff's due process claim was properly dismissed. (App. 1). The Plaintiff's motion for rehearing and motion to recall and stay the mandate were denied (App. 2).

SUMMARY OF THE ARGUMENT

This is a factually unique lawsuit that does not compel this Court's discretionary jurisdiction. The decisions of the Southern District of Florida and the Eleventh Circuit Court of Appeal do not conflict with the decisions of any other courts of appeals or this Court; they do not address "important federal questions," and, thus, do not require any settlement by this Court. In essence, the Plaintiff/Petitioner seeks review of decisions based on a unique set of facts (those giving rise to the underlying complaint, and those regarding the alleged discovery violations), on issues that were entirely within the discretion of the district court and/or decisions based on the alleged misapplication of Florida law. As such, this Court should deny the Petition for Writ of Certiorari.

Each of the questions presented to this Court has been raised, and adequately addressed below. First, the district court and the Eleventh Circuit Court of Appeals properly concluded, under *Florida* law, that the Plaintiff was employed under an annual contract with the School Board at all times material hereto. The Plaintiff's assertions to the contrary, some of which are raised for the first time here, are simply misplaced and, even if accurate, do not warrant this Court's involvement where they address the application of *Florida* law to a *Florida* statute.

Second, the Plaintiff takes issue with the district court's refusal to enter a default judgment against the School Board. Not only was that determination *entirely* discretionary on the part of the district court but, as recognized by the Eleventh Circuit, such a drastic sanction was not warranted under the circumstances where the School Board did ultimately respond to the discovery requests.

Third, the Plaintiff asserts that the district court improperly applied the summary judgment standard as, apparently, did the Eleventh Circuit in its *de novo* review. This contention hardly warrants a response, much less this Court's involvement. Nevertheless, both the district court and the Eleventh Circuit properly concluded that the Plaintiff failed to present any material questions of fact sufficient to withstand the summary judgment challenges.

Fourth, and finally, the Petitioner contends that the district court inappropriately granted summary judgment despite a pending claim for spoliation. Contrary to the Petitioner's assertion, however, both the district court and the circuit court concluded that there was no evidence of spoliation of evidence, that a spoliation instruction was not warranted, and that summary judgment was appropriately awarded.

ARGUMENT

I. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS (AND THE DISTRICT COURT) ERRED IN CONCLUDING THAT THE ANNUAL LETTERS TO THE PLAINTIFF, WHICH WERE PERFORMED BY BOTH PARTIES, CONSTITUTED CONTRACTS UNDER FLORIDA LAW.

Though the magistrate judge, the district court and the circuit court have all disagreed, as a matter of law, the Plaintiff continues to assert that she was employed under a continuing contract. In turn, the Plaintiff asserts, she has not been provided the due process to which she is entitled.

This is, at its crux, a question of Florida law with which this Court need not concern itself. Nevertheless, on the merits, the Plaintiff was, indeed, provided with all of the due process to which she is, or was, entitled, and the district and circuit courts appropriately concluded that she was employed under an annual contract.

The success of a due process argument depends on the finding of a constitutionally-protected property interest in the expectation of continued employment, or of a liberty interest having been infringed upon by the state. Absent such interest, no due process protections attach. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). A property interest is generally created out of a state statute or an individual contract, not an abstract need or desire for it or a unilateral expectation of it. Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537 (11th Cir. 1989).

Despite her continuing suggestions to the contrary, the Plaintiff was an administrator employed under annual contracts with the School Board, all of which were performed by both parties. As such, the Plaintiff, had no claim to a due process violation, as she had no valid property interest in, or right to, continued employment with the School Board.

As explained by Superintendent Petruzielo, *all* school-based and district administrators within the School Board of Broward County are employed subject to annual contracts (4R 143, Exh. E, pp. 14-17). The district and circuit courts properly concluded that there was no question of fact as to this issue based on: (a) the annual letters/contracts themselves, which were all attached to the motion for summary judgment, (b) the Plaintiff's own testimony that she had been told that, as an administrator, she was subject to an annual contract, and (c) the fact that the Plaintiff, and the School Board, had performed each of those contracts to conclusion, (4R 127, Exh. A , pp. 21-24, 117, 248-249, Exh. B, D, F and G).

The annual contracts (letters) attached to the summary judgment are indeed contracts, as a matter of law, that comply with the requirements of Florida law. As found in Jones v. Miami-Dade County Public Schools, 816 So. 2d 824 (Fla. 3d DCA 2002), a teacher's continuing contract status does not automatically follow him or her when subsequently promoted to an administrative position; upon promotion, the former teacher, now administrator, must earn continuing contract status in that position.[2]

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[2] The "continuing" contract on which the Plaintiff continually relies is a "Continuing Contract for *Instructional Personnel*" entered into by the parties in 1973, which governed the

The letters provided to the Plaintiff met all requirements of Florida law, and constituted enforceable annual contracts which, incidentally, both parties performed to conclusion. *See*, §231.26, Fla. Stat. (requiring only "written" contract, without other specifications); Vienneau v. Metro. Life Ins. Co., 548 So. 2d 856, 859 (Fla. 4th DCA 1989) (construction of employment contract, presents a question of law for the court, if its language is clear and unambiguous); Story v. Culverhouse, 727 So. 2d 1128, 1130 (Fla. 2d DCA 1998)(letter providing salary, calendar, and duration of agreement was unambiguous, valid, enforceable, employment agreement).

As an employee under an annual contract, the Plaintiff had no expectation to continued employment as a principal, pursuant to Florida law, any contract, or by any "de facto"[3] tenure. A school employee serving under an annual contract, like the Plaintiff, is not entitled to an administrative hearing unless the employee is discharged prior to the expiration of the

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Plaintiff's employment as a teacher (i.e., instructional personnel) within the School Board. As stated by Superintendent Petruzielo, and acknowledged by the Plaintiff, *all* administrative personnel within the School Board are employed pursuant to *annual* contracts. Per Jones, *supra*, that contract did not automatically follow the Plaintiff and become applicable to her as an administrator.

[3] In Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court acknowledged that a professor might obtain de facto tenure even though tenure had never been formally conferred. However, the School Board contends that there are no facts in this case to warrant such a contention. *See, e.g.*, Gray v. Bd. of Regents of the Univ. Sys. of Georgia, 150 F.3d 1347 (11th Cir. 1998); Schneider, 875 F.2d at 1544-1545. *See also*, Sch. Bd. of Leon County v. Goodson, 335 So. 2d 308 (Fla. 1st DCA 1976).

contract or if the employee can assert a constitutionally impermissible reason for the discharge. *See* Jones, 816 So. 2d at 826. *See also*, Thaw v. Bd. of Pub. Instruction of Dade County, 432 F. 2d 98, 100 (5th Cir. 1970); Nelson v. Sch. Bd. of Palm Beach County, Florida, 738 F. Supp. 478 (S.D.Fla. 1990); Fertally v. Miami-Dade Community College, 651 So. 2d 1283, 1284 (Fla. 3d DCA 1995). *See also*, Fla. Admin. Code r. 6A-1.0691. Because the plaintiff had no expectancy of employment beyond the contract period, the decision not to enter into a new annual contract, or to offer a revised contract, is not reviewable. *See* Fertally, 651 So. 2d at 1285. *See also*, Sullivan v. Sch. Bd. of Pinellas County, 773 F.2d 1182, 1185 (11th Cir. 1985)(assistant superintendent, as non-tenured employee of school district, had neither protected property interest nor protected liberty interest in continued employment and, absent such, "was not entitled to any process at all"), *citing*, Roth, 408 U.S. at 564; Brew v. Sch. Bd. of Orange County, Florida, 626 F. Supp. 709, 713-714 (M.D.Fla. 1985)(school board employee with valid fixed-term contract had no property interest in continued employment and could not challenge non-renewal of her contract), *aff'd*, 802 F.2d 1397 (11th Cir. 1986); Sherrod v. Palm Beach County Sch. Bd., 620 F. Supp. 1275, 1276 (S.D.Fla. 1985)(plaintiff's "mere expectation" that a continuing contract would be offered is insufficient to create a constitutionally protected right), *aff'd*, 792 F.2d 1125 (11th Cir. 1986); Sickon v. Sch. Bd. of Alachua County, Florida, 719 So. 2d 360 (Fla. 1st DCA 1998)(denial of administrative hearing upheld where school teacher had no property interest in maintaining position as band director).

Like the employees in the above-mentioned cases, the Plaintiff here, who acknowledged that she was employed under annual contracts during her tenure as an administrator within the School Board, (1) was not employed under a continuing contract as an administrator; (2) was not dismissed (or demoted) during the term of an annual contract; (3) was provided with notice, year after year, of her performance deficiencies; (4) was demoted at the conclusion of an annual contract; (4) never sought a formal administrative review or hearing; and (5) never asserted that she was demoted for constitutionally-impermissible reasons until she filed a notice with the EEOC more than three years after her purported demotion.

As such, both the School Board and Superintendent Petruzielo were appropriately awarded summary judgment as to the Plaintiff's due process claims based on a determination that the Plaintiff was employed under annual contracts. The summary judgment on the due process issue is further supported by the Plaintiff's own testimony that she voluntarily chose not to seek an administrative hearing concerning her demotion (4R 137, pp. 26-27).

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ENTER A DEFAULT JUDGMENT AGAINST THE SCHOOL BOARD (AND, THUS, WHETHER THE ELEVENTH CIRCUIT ERRED IN FINDING THAT THE DISTRICT COURT'S ENTRY OF A LESSER SANCTION WAS WITHIN ITS DISCRETION) WHEN THE SCHOOL BOARD ULTIMATELY RESPONDED TO THE DISCOVERY REQUESTS.

A district court has the utmost discretion in ruling on discovery proceedings. *See e.g.*, Burger King Corp. v. C.R. Weaver, 169 F.3d 1310 (11th Cir. 1999). To reverse the district court, the court of appeals must be left with "definite and firm conviction that the court below committed error of judgment." *See* BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045 (11th Cir. 1994). Here, the circuit court concluded, quite to the contrary, that the district court acted well within its discretion in refusing to enter such a drastic sanction. These determinations, on an issue solely within the discretion of the trial court, do not warrant or require this Court's involvement. Nevertheless, the School Board and Dr. Petruzielo offer the following brief argument as to the merits of this issue.

In the present case, there were, undoubtedly, problems with discovery attributable to *all* of the parties. Due to these problems, and differences in opinion with regard to whether discovery responses were complete and/or sufficient, the magistrate judge took a more-active-than-usual role in the discovery process.

Despite the Plaintiff's attempts to castigate the Defendants from the very beginning of this lawsuit (before their responsive pleadings were even filed), there is absolutely no evidence in this record that the School Board's conduct constituted flagrant disregard or willful disobedience as suggested. The School Board provided the court with an explanation of the circumstances giving rise to the discovery issues in this case, including confusion created by the Plaintiff's attachment of an improper exhibit, the unavoidable delay incurred in copying extensive, voluminous personnel files (and redacting those personnel files), and in creating documents that did not otherwise exist in any form, in order to adequately respond to the Plaintiff's discovery requests. The School Board (and Superintendent Petruzielo) steadfastly maintain, as they did before the magistrate judge, the district court and the circuit court, that they complied with all discovery requests. It is quite telling that the magistrate judge, who oversaw the discovery process here, never concluded that these Defendants should be responsible for the Plaintiff's attorney's fees, much less that a dismissal of their defenses or a default judgment was warranted.

Once again, the Plaintiff fails to submit anything, other than conclusory allegations, to support any claim that the magistrate judge and/or district court abused their discretion during the discovery proceedings. The cases cited by the Plaintiff, which uphold the entry of default for discovery violations, are inapplicable. They do not support her contention that the trial court erred in *refusing* to grant such sanctions under the facts of this case. Further, as implicitly suggested by the circuit court, it might have been an abuse of discretion for the district court to have entered a default when "less draconian but equally efficient sanctions" were available. App. 1, *citing*, Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1366 (11th Cir. 1997).

III. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT IN ITS *DE NOVO* REVIEW) APPLIED THE IMPROPER STANDARD ON SUMMARY JUDGMENT.

The Plaintiff's suggestion that the magistrate judge, the district court, and the circuit court applied the improper standard on summary judgment is completely misplaced and does not warrant review by this Court. The entire rationale underlying the Plaintiff's argument on this point is inaccurate; throughout this case, the Plaintiff has taken the improper legal position that the School Board and Superintendent Petruzielo, as the Defendants in the lawsuit, have the burden of "disproving" her theories in order to succeed on summary judgment. While the School Board and Superintendent Petruzielo acknowledge that, on summary judgment, the court is to view the facts in the light most favorable to the non-moving party, they nonetheless contend that it is the Plaintiff who bears the burden of establishing that the Defendants intentionally discriminated against her, a fact the Plaintiff seems to overlook. *See, e.g.*, Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1375 (11th Cir. 1996); Richardson v. Leeds Police Dep't, 71 F.3d 801, 805 (11th Cir. 1995). It is the Plaintiff who must establish a prima facie case of discrimination, Pearson v. Macon-Bibb County Hosp., 952 F.2d 1274, 1281 (11th Cir. 1992) and who, ultimately, must prove by a preponderance of the evidence that the Defendants "acted with discriminatory intent." *See, e.g.*, Richardson, 71 F.3d at 805. As found by the district court and the circuit court, for the reasons set forth in their opinions, the Plaintiff failed to meet this burden. *See* App. 1-5.

IV. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT) IMPROPERLY CONCLUDED THAT THERE WAS NO EVIDENCE OF SPOLIATION OF EVIDENCE.

Once again, the Plaintiff asks this Court to accept jurisdiction to address a question that was entirely within the discretion of the trial court, i.e., whether there was evidence of spoliation in this case. The district and circuit courts readily agreed that the record was devoid of any evidence of spoliation, and that the doctrine was wholly inapplicable to this case. The Plaintiff does not contend that the district court or the circuit court improperly applied the law, and there is no need for this Court to address the issue.

Substantively, the record in this case does not reflect that the School Board or Superintendent Petruzielo altered or destroyed evidence As such, the doctrine of spoliation of evidence is wholly inapplicable here.

First, the Florida courts only apply spoliation inferences to cases involving the "destruction" of evidence. *See generally*, Florida Evergreen Foliage v. E.I. DuPont de Nemours and Co., 165 F. Supp. 2d 1345, 1359 (S.D.Fla. 2001)(further recognizing that Plaintiff must be unable to prove her underlying action without the evidence). Second, Eleventh Circuit precedent clearly imposes a requirement of bad faith for the imposition of sanctions in connection with the destruction of evidence. Banco Latino, S.A.C.A. v.

Lopez, 53 F. Supp. 2d 1273, 1277 (S.D.Fla. 1999). During the litigation, the Plaintiff's counsel conceded that she had no knowledge of spoliation (3R 93, p. 30). Absent any evidence of alleged destruction or "unexplained disappearance of crucial evidence," the doctrine of spoliation was wholly inapplicable and the district court (and circuit court, in turn), did not abuse any discretion in failing to apply that doctrine to the facts of this case. Moghari v. Anthony Abraham Chevrolet, 699 So. 2d 278, 279 (Fla. 3d DCA 1997).

CONCLUSION

Wherefore, the Respondents, THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA and its former Superintendent, FRANK R. PETRUZIELO, respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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